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A

TREATISE

ON THE

PRINCIPLES AND PRACTICE

OF THE

HIGH COURT OF CHANCERY;

UNDER THE FOLLOWING HEADS:

I. COMMON LAW JURISDICTION OF THE CHANCELLOR.

II. EQUITY JURISDICTION OF THE CHANCELLOR.

III. STATUTORY JURISDICTION OF THE CHANCELLOR.

IV. SPECIALLY DELEGATED JURISDICTION OF THE CHANCELLOR.

BY HENRY MADDOCK, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

IN TWO VOLUMES.

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TO

THE RIGHT HONOURABLE

JOHN LORD ELDON,

BARON ELDON, OF ELDON, IN THE COUNTY OF DURHAM,

LORD HIGH CHANCELLOR OF THE UNITED KINGDOM,

THE FOLLOWING TREATISE,

IS RESPECTFULLY INSCRIBED.

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PREFACE.

THE following Work is the result of the leisure hours of several years. Desirous from duty and inclination, to acquaint myself with the principles and practice of the Court of Chancery, I resolved, early in my professional studies, to read all the Chancery Reports of reputation and authority, beginning with the most modern, and concluding with the most ancient. This course of reading I pursued always with my pen in my hand, extracting the principles and the practice, as I read, and arranging them under such heads as seemed the most natural and convenient. This is the secret history of the design and execution of this Work, which was originally intended only for private use. I might have taken an easier course; I might have applied myself to the treatises, several of them able ones, which have been written, on many of the subjects of the following Work, and have made a compilation of compila-

tions; but this was repugnant to my feelings, as being neither satisfactory, nor just.

To collect a multiplicity of particulars under general heads, and to refer a variety of operations to their common principle, has been justly observed to be the object of science; but if it were true, that the Chancellor in the exercise of his Jurisdiction, acted only, as is vulgarly supposed, according to an unbounded discretion, *nunc severius, nunc mitius agendo prout viderint expedire*, it would be a folly to attempt to systematise the doctrines of the Chancery; for what would be the use of principles, if they were of so fluctuating a nature that Chancellors might regard or disregard them as they thought proper? In respect to costs, the Court does, indeed, from necessity, use a discretion, and it is the most painful part of its duty; but in other respects, the system of our Courts of Equity is a laboured connected system, governed by established Rules, and bound down by precedents, from which the judges do not depart, although the reason of some of them may, perhaps, be liable to objection.

In cases of *Trust* and of *Fraud*, Chancellors, it is true, have been unwilling to set bounds to their jurisdiction, and say *how*

far, in cases of that description, they will go; yet so far as they *have* gone, the *principles* laid down, are binding authority.

"*There are*," says Lord Redesdale, "*certain principles on which Courts of Equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of Equity have in this respect no more discretionary power than Courts of Law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the Courts of Common Law proceed*[d]."

If Chancellors were not guided by Precedent, there ought to be fifty Courts of Chancery. A decided point is now never discussed, but if Precedents were of no avail, each case must be argued on first principles, and the affairs of mankind could not be carried on.

It seldom happens that a case comes before the Chancellor unaffected by previous decision:—one, I remember, before a great Judge, and he begins his decision by saying, "*Having had doubts upon this Will for twenty years,*

[d] Bond v. Hopkins, 1 Sch. and Lefr. 428, 9.

&c." Had there been cases in point, that eminent Man, equal to any, and superior to most of his Predecessors, would have decided in five minutes, what he had been twenty years doubting upon.

Lord Nottingham, disapproving of some cases cited to him, said with some warmth "*that he would alter the Law in that point*[f];" but *Lord Talbot*, when this saying was mentioned to him, observed, "I do not see how any thing less than an act of Parliament can alter the Law[g]." "If," said his Lordship, "the Law as it now stands, be thought inconvenient, it will be a good reason for the Legislature to alter it; but till that is done, what is Law at present must take place[h]."

In the Case of *Fry and Porter*[i], Lord Ch. J. Vaughan, who was called in to the assistance of the Chancellor, said "he wondered to hear of citing of Precedents in matter of Equity; for if there be Equity in a case, that Equity is an universal truth, and there can be no precedent in it: so that in any Precedent that can be produced, if it be the same with this case, the Reason and Equity is the same in itself; and if the Precedent be

[f] Freeman v. Goodham, Ch. Rep. 195.
[g] Heard v. Stamford, 3 P. Wms. 411.
[h] Ib.
[i] 1 Mod. p. 300. Edit. by Leach.

not the same with this case, it is not to be cited, being not to that purpose;" but the Lord Keeper Bridgman vindicated the use of Precedents. "Certainly," says he, "Precedents are very necessary and useful to us, for in them we may find the reasons of the Equity to guide us, and besides, the authority of those who made them, is much to be regarded. We shall suppose they did it upon great consideration, and weighing of the matter; *and it would be very strange, and very ill if we should disturb and set aside what has been the course for a long series of time and ages.*" *L. C. Baron Hale* said, "I know there is no intrinsical difference in cases by Precedents; but there is a great difference in a case wherein a Man is to make, and where a man sees, (and is to follow) a Precedent: in the one case a Man is more strictly bound up, but in the other he may take a greater liberty and latitude; for if a Man be in doubt, *in æquilibrio*, concerning a case, whether it be equitable or no, in prudence he will determine according as the Precedents have been, especially if they have been made by Men of good authority for learning, &c. and have been continued or pursued."

One is a little surprised at an expression

of *Lord Northington's*, upon a Precedent quoted before him, a decision of *Lord Hardwicke*. "It is," said he, "an authority for the Master of the Rolls. But I feel only one authority, that of the *House of Lords*, which is a superior Court; no other authority has any influence on my Judgment [k]."

He is the only Chancellor, since the Revolution, who has used such Language.

It was the expressed opinion of *Lord Macclesfield*, never to shake any settled resolution touching property, or the Title of Land; it being for the common good that these should be certain and known, however ill grounded the first resolution might be [l].

As to inconveniencies, if the Law is clear, they afford no argument of weight with the Judge. The Legislature only can remedy them; they are properly considered only in a case where the Court entertains *doubts* [m].

Often is a Judge, even in a Court of Equity, compelled to exclaim, "I yield to the *authority*, but not to the *reason* of the Cases [n]."

It was the opinion of *Lord Thurlow*, that,

[k] Attorney General against Tyndall, Ambl. 616.

[l] Wagstaff v. Wagstaff, 2 P. Wms. 258,9.

[m] Pike against Hoare, Ambl. 430; and see what is said in Sparrow v. Hardcastle, Ambl. 227. and in 2 Atk. 560.

[n] See 2 Bro. C. C. 80.

" for the purpose of securing property, and the due administration of Justice in a free country, judges ought to abide constantly by real principles, and by such beneficial Rules as may afford some reasonable judgment without applying to a superior tribunal [o]."

No man criticised more upon Rules laid down by other Judges, than *Lord Thurlow*; but no man was more rigid in observing them when he could once deduce them [p]. The same observation may be made of *Lord Eldon*. Nobody criticises judgments more, or sees more clearly the wisdom, or the errors of his predecessors; but no one has adhered more pertinaciously to established Rules.

From many considerations one might expect that the Court of Chancery would exhibit an almost perfect system. The Chancellor always is, and must be, of transcendent talent. His Decisions are not, necessarily, instantaneous—he may take what time he pleases to decide; no hasty, off-hand, *nisi prius* opinion, is required of him. Such are the subjects upon which he decides, that all party prejudices and pas-

[o] 1 Bro. C. C. 465.

[p] See what is said by Lord Alvanley in Hinchliffe v. Hinchliffe, 3 Ves. 527.

sions and influence are excluded. They are only questions of *Property* that come before the Chancellor. No State Prosecutions, no Treasons, no Libels, no Misdemeanors; in a word, no question which involves *Punishment*, or where *Damages* are sought, are brought before the Chancellor's Tribunal; so that his Decisions are subject to no undue bias of any kind. There was, to be sure, a time, when the Court wrote to the Chancellor, in what way to decide; but this abuse has long, very long, been at an end. No Science will ever come to perfection where it is the Interest of the Professors, to keep it imperfect; but what Interest can our Chancellors have, in keeping the Chancery System imperfect, and to what is to be ascribed such a variety of Distinctions?

"General Rules are easily framed, but the application of them creates considerable difficulty in all cases in which the Rule is not sufficiently comprehensive to meet each circumstance, which may enter into and affect the particular case:" hence, distinctions unavoidably arise.

Some of these niceties, have arisen from the pride of Intellect;—that pride, which excites minds to triumph over their Pre-

decessors in Office—to shew their errors, and establish wiser systems than those they constructed. But while each Chancellor thinks for himself, they seem to forget mankind; they shew themselves wiser perhaps than those who went before them, "*plus sages que les sages*," but by their differences, they bewilder the Suitor, who only wants some certain Rule on which he may rely.

Another cause of the magnitude of the Chancery System, arises in a great degree, from what is, certainly, a noble error, the humanity of the Chancellors. To help an individual hardship, a general inconvenience is often occasioned; the Law is strained, and ingenious distinctions are created.

I flatter myself this Work will prove useful to all ranks of the Profession, and more especially, to the young Student.

We have, it is true, detached Treatises on equitable Subjects, and also the Reports of the Proceedings in Courts of Equity, which, certainly, are so many rich Mines of equitable Principles; but is it to be expected that a young Student, warm with the fascinating charms of the Classics, and the generous Studies of the University, should read with any patience, a variety of Treatises, and pore over a long series of vo-

luminous Reports, before he has imbibed some elementary Principles on the Subject, and obtained some sort of clue to the vast labyrinth before him. *Blackstone* in his Commentaries alludes occasionally to our Courts of Equity; but his Treatment of the subject, though much to be admired so far as it extends, must yet be allowed to afford a very trifling knowledge of the principles of Equity. It is, in truth, one of the most deficient parts of that excellent Work. He has given an admirable view of part of the Laws of England, and particularly of the Common Law; but we look in vain into that unrivalled Work for any detailed information relative to the Principles and Doctrines of the Court of Chancery. What little *Blackstone* there says of the Court of Chancery is sketched with admirable spirit and correctness; and fortunate had it been, if such a genius had been applied to analize and unfold the principles of that Court.

It is very surprising that this should be the first attempt that has been made to reduce into one comprehensive view, all the Doctrines of the Court of Chancery.

Lord Nottingham, who has been called "the Father of Equity," appears to have planned, and partly to have executed a

Work of this description; but he lived in the infancy of the Science.

It seems to have been the general opinion, that such a Work was impracticable, *opus desperatum;* but the more we reflect, the more we shall be convinced, that the Doctrines of the Court of Chancery are reducible into System. Before the time of *Sir Matthew Hale*, the *Common Law* was considered as incapable of being reduced into System, by reason, it was said, of the indigestedness of it, and the multiplicity of the Cases; but *Sir Matthew Hale* was not of that opinion, and he immediately began his famous *Analysis*, and fully shewed he had reason to be so. On the foundation of that Treatise, *Blackstone* built his immortal Work. In like manner, it seems to me, that all the proceedings in the Court of Chancery are referable to some fixed principles; and are as capable of being treated of systematically as the Common Law. *Lord Nottingham* observes of *Sir Matthew Hale*, that he looked upon Equity as part of the Common Law, and one of the grounds of it, and therefore as near as he could, he did always reduce it to certain Rules and Principles that men might study it as a science, and not think

the administration of it had any thing arbitrary in it [u].

The *Lex Prætoria* of Ch. Baron Gilbert, of which I have a copy in manuscript; the *Treatise of Equity* by Mr. Ballow; and the *Principles of Equity* by Lord Kaims, have each their respective merits; but neither of them exhibits that arrangement and comprehension which the subject seems of deserve, and require.

The *Lex Prætoria* is a very confined and unfinished sketch.

The work, entitled, *Principles of Equity*, is too theoretical, and founded more on Scotch Law, than on the decisions of English Courts of Equity, and has never been looked up to as an authority. The *Treatise on Equity*, is a masterly work, and possesses too many excellencies to be hurt by any little criticism; but with all its merits, it must be confessed to be not sufficiently comprehensive or methodical, and like the other works I have noticed, unavoidably deficient in the information to be gathered from the modern Reports, by which the doctrines of the Court of Chancery have been so much illustrated and enlarged. *Mr. Fonblanque*,

[u] See Burnet's Life and Death of Hale, p. 176. The great man mentioned by the Bishop in 172. was Lord Nottingham.

the Editor of the last-mentioned Work, has up to the period at which he wrote, remedied one of its defects, by his references to the modern decisions; but his notes, learned, useful and able as they are, are unavoidably desultory and unconnected, and have rendered still more glaring the remaining deficiencies of the original Work. If the Editor's delicacy had permitted him to recast the whole treatise, we should, probably, have been furnished with a complete work; such as might be expected from his great abilities, and long experience.

From the plan on which this treatise was composed, I have had occasion to borrow but little from the works I have mentioned; none at all from Lord *Kaims's* work; and in those few instances where I have received assistance from them, or from other Works, I have acknowledged the obligation.

The first object of every student ought to be to study the elements of the doctrines of his Art, and in almost all the Sciences, such Works are to be found. "Whosoever," says *Lord Chancellor Fortescue*[1], "desires to get a competent understanding in any faculty or science, must by all means be well instructed in the

[1] Fortescue de Laud. Ang. Ch. 8.

Principles thereof; for by reasoning from the Principles which are universally acknowledged and uncontested, we arrive at length at the final causes of things; so that whoever is ignorant of these three, the Principles, Causes, and Elements of any Science, must needs be fatally ignorant of the Science itself; on the other hand, when these are known, the Science itself is known too, at least in general and in the main, though not distinctly and completely." All those vast frightful volumes, termed Reports, would no longer appal the Student, if he had but a guide, in the mighty maze before him; for cases are but corollaries from first principles; they are proper enough, nay indispensable, as works for occasional Reference, but are wholly improper to be studied as elementary Books. Without method, though full of various knowledge, to use the Language of the Institutes, "they cause the Student either wholly to abandon his Studies, or bring him late through a series of labours to that knowledge which he might otherwise have attained with ease and expedition[x]."

[x] Just. Instit. Lib. 1. Tit. 1. s. 2.

I cannot here deny myself the pleasure of remarking how greatly the profession is indebted to Mr. Vesey, Jun. for his Reports of Cases in Chancery, for a series of years. They are valuable for the judgment shewn in the selection, and for their extraordinary fidelity and exactness.

Unless the principles of Chancery Science are mastered, it requires incessant application, and a stupendous memory to retain every particular decision; but when once the principles are thoroughly acquired, the application needs not be so incessant, and the memory, without any extraordinary effort, will easily store up and recal, as occasion may require, every important case which has been presented to the mind, either by reading or experience.

"I am inclined to believe," says an accurate observer of the human mind, "both from a theoretical view of the subject, and from my own observations, as far as they have reached, that if we wish to fix the particulars of our knowledge very permanently in the memory, the most effectual way of doing it, is to refer them to general principles [y]."

In the execution of this Work, I have confined myself to the consideration of matters, which exclusively fall under the cognizance of the Chancellor, or concurrently with other Courts of Equity. It is true, that a question of mere Law is often discussed in Courts of Equity, and this is frequently necessary, before equitable re-

[y] Stewart's Elements of the Philosophy of the Human Mind, p. 425.

lief can be administered; but whenever such points arise, the Chancellor follows the Law, and such points are determined, in conformity with the decisions of the Common Law Courts. But though such questions do often collaterally arise, and almost every point of Law is occasionally brought into discussion, and our Equity Reports abound with them, yet I think it unnecessary to detail the Principles of the decisions of the Chancellor on points of Law, and this, for several reasons. Because, though the opinion of the Chancellor even on a point of Law, must always be looked up to with great respect, yet, certainly, such points are decided with more of weight in the Common Law Courts, since the Judges are numerous, and their studies have been peculiarly devoted to the learning on such subjects. The opinion of the Chancellor on a point of Common Law, cannot be put in competition with an express decision of the Common Law Courts on the same subject. It is therefore to the decisions of the Common Law Courts, that reference should be made, on such points. Indeed, if the Chancellor has any doubt on a mere point of Law, if the point has not been clearly settled by Common Law determinations,

it is his constant habit to refer to a Court of Common Law for its opinion; and though strictly speaking, the Chancellor is not bound to act upon the answer of a Court of Law [z], yet that opinion always governs the Chancellor; a plain proof this of its pre-eminent authority in Common Law Science.

Of questions of Law the Judges are the sworn and proper Judges. "If," says the *Lord Keeper Bridgman*, who had called some of the Judges to his assistance, "I were of another opinion, yet I would be bound by the opinion of my Lords the Judges [a]."

In a case in which *Lord Hardwicke* had received the opinion of a Court of Common Law on a case sent by him, he observed, "I shall not send it again to Law: and however I might have doubted, if I had sat in the King's Bench, on the argument in point of Law, yet I shall not depart from the opinion of those learned Judges [b]."

And in another Case, where the Chancellor had called upon some of the Judges to assist him in a case before the Court, he observes, "If I had even now a doubt con-

[z] 14 Ves. 32.
[a] Fry and Porter, 1 Mod. Ambl. 185.
[b] Ekins against Macklish, 213.

cerning it, I should have held myself bound by the opinion of the Judges as a matter within their conuzance, in like manner, as if I had sent this to be tried at Law, in which case, the Court always decrees consequentially to the Trial [c]." A plain proof this of the binding effect of the decisions of Courts of Common Law upon the Chancellor.

To introduce questions of pure Law in a treatise on Equity, renders the work incapable of system, confused, and immethodical, and is an amalgamation which serves only to embarrass the reader. It is, I believe, one of the principal causes that has obstructed the reduction of Equity Principles to system and method. I have therefore, as much as possible avoided any notice of Common Law doctrines in the ensuing work, and must refer my readers to Common Law writers, for such learning.

My original design was to prefix to this work, *An historical View, of the Rise and Progress of the Chancellor's Authority;* conceiving it be a natural and proper introduction. The enquiry, cost me great Labour, and much antiquarian research; but as I

[c] See Chesterfield v. Janson, 2 Ves. 155. and what Lord Eldon says in Dashwood v. Peyton, 18 Ves. 97.

had mixed with it, the characters of the Chancellors; the anecdotes concerning them connected with the administration of Justice; the various disputes respecting the Chancery; the progress from arbitrary discretion to fixed Rules; a vindication of the Jurisdiction from the cavils of various Writers; a suggestion of possible improvements; and other matters incidentally relating to it; my materials extended so much beyond what I originally intended, a short dissertation, that they amounted to a volume; and as inquiries of this description are suitable only to the taste of a few, and the publication would have very considerably encreased the size and price of the Work, without contributing much to its utility, I dropped this part of my design, though not without some reluctance, as the subject was a favourite one.

Many persons have conceived a prejudice against the Court of Chancery, and have considered it, as an huge overgrown excrescence, which called for the pruning knife of the Legislature; but this is the language of presuming ignorance. Some defects it has; the machinery of the great System has, till lately, been too slow in its motions; but after contemplating the System in all its

parts, visiting its foundations, and witnessing its benefits, it is in my humble apprehension, a most beneficent system, and of unparralleled wisdom and utility; exhibiting, occasionally, all the subtlety of the disciples of Loyola, but employing it to aid the sacred cause of Justice.

To some, the numerous citations of cases may seem like an ostentation of reading; but every professional Man is fully aware, that the greatest merit in a legal Writer will not compensate for the want of cases in support of his positions. In an English Court of Justice, the veriest dolt that ever stammered a sentence, would be more attended to with a case in point, than Cicero with all his eloquence, unsupported by authorities; and it is fit it should be so, for how, otherwise, can Law be, what it ought to be, a *certain Rule of Conduct*.

Old Buildings, Lincoln's Inn,
Nov. 1. 1814.

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A

TREATISE,

&c.

ALL matters determinable by the Chancellor, in the Court of Chancery, may be classed under one or other of the following heads:

I. THE COMMON LAW JURISDICTION.

II. THE EQUITY JURISDICTION.

III. THE STATUTORY JURISDICTION.

IV. THE SPECIALLY DELEGATED JURISDICTION.

CHAP. I.

COMMON LAW JURISDICTION OF THE CHANCELLOR.

THE Chancellor is, by the common law, invested with various powers. He is a privy counsellor and prolocutor of the House of Lords, as well as patron of the King's livings under the value of twenty marks per annum in the King's books [a]. He is also, by the common law, a con-

[a] See 38 Edw. 3. 3. and 13 Edw. 4. 3. 11 Hen. 4. 80. F. N. B. 83 K. 4to ed. It appears from the Rolls of Parliament in the time of *Edw.* 3. that it had previously been the usage for the Chancellors to give all the *King's livings*, taxed (by the subsidy assessments) at twenty marks, or under, *to the clerks, who were then actually cleri or clergymen, who had long laboured in the court of Chancery ;* but that the Bishop of Lincoln, when he was chancellor, had given such livings to his own and other clerks, contrary to the pleasure of the King and the ancient usage ; and therefore it was recommended to the King by the Council, to command the Chancellor to give such livings only to *the clerks of Chancery*, the Exchequer, and the other two benches or courts at Westminster-Hall, 4 Edw. 3. No. 51. quot. Gibson's Codex, 764. But since the new valuation of benefices, or the King's books in the time of Henry the Eighth, and the clerks ceased to be in orders, the Chancellor has had the absolute disposal of all the king's livings, even where the presentation devolves to the crown by lapse, of the value of twenty pounds a year, or under, in the King's books. It does not appear how this en-

servator of the peace, and may award precepts and take recognizances for the peace. The Parliament is summoned by writs issued by the Chancellor, and all the Acts passed, are enrolled and kept in Chancery. But these matters, and the learning respecting them, are not here intended to be treated of, but only such parts of his common law jurisdiction, as have been made the subject of discussion before the Chancellor in the court of Chancery. These consist, principally, of three kinds:

1. *The Admission of Officers of the Court;*

Such as the *Cursitors* and *Masters in Chancery*, who are nominated, admitted, and sworn by the Chancellor [b]. Another part of the Chancellor's common law authority is in respect of,

2. *Proceedings in the Petty Bag Office.*

In this court, the Chancellor has, by the common law, jurisdiction to hold a plea of *scire facias*

larged patronage was obtained by the Chancellor, but it was probably by private grant of the Crown, from a consideration that the twenty marks in the time of Edward the third, were equivalent to twenty pounds in the time of Henry the Eighth, Gibs. 764. 1 Burn. Eccl. Law, 129. quot. 3 vol. Black. Com. p. 47. in note by Mr. Christian.

In *Scotland*, too, at a very early period, the Chancellor of that country seems to have exercised a right of presentation somewhat similar to the Chancellor of England; for in the year 1309, *William de Bevercotes*, the Scottish Chancellor, presented a petition to the King in Parliament, praying that he might have the gift *of all* the King's churches, *as former Chancellors* used to have; and this prayer was granted, as to those benefices which did not exceed ten pounds per annum. Ryley's Placita, 613, 14. &c. See also Prynne, quot. Chalmer's Caledonia, Vol. I. p. 693.

[b] Vid. *Judicial Authority*, &c. p. 60.

to repeal the King's *letters patent*[c], of petitions, *monstrans de droit*[d], traverses of office, *scire facias* upon recognizances[e], executions upon statutes, &c. which being registered in this court, the process issued out of the same, and was returnable there, and entered in the office, called the *Petty Bag*[f]. All personal actions by or against any officer or minister of the court, in respect of his service or attendance, may be brought in this court[g].

When, however, the parties proceed to issue, the Chancellor cannot try it, as he may do a demurrer[h], but must deliver the record into the King's Bench, where judgment is given: and no judgment can be given by the Chancellor, unless in term; and where it was given out of term it was ordered to be drawn up the next term[i].

When a writ of *scire facias* is issued out of the Petty Bag to repeal a charter, upon issue being joined, the record is transmitted into the Crown Office of the King's Bench, and the cause is tried at the bar of that court[k].

The jurisdiction of the Chancellor in this Court being so very limited, is the reason, probably, that

[c] 4 Inst. 79. As to proceedings on a *scire facias*, and a judgment for cancelling letters patent, see *Prince's case*, 8 Co. 1, &c

[d] See the form of a judgment upon a *monstrans de droit*, 8 Co. 404.

[e] Recognizances entered into in pursuance of an order of the court of Chancery will not be allowed to be sued upon, otherwise than by a *scire facias* in Chancery. [*Grant* v. *Stone*, 1 Vern. 213.] And see Latch. 3. 1 Eq. Cas. Abr. 128. Cro. Car. 113.

[f] 4 Inst. 80.

[g] 2 Bac. Abr. 136.

[h] Ibid.

[i] Ambl. 296.

[k] As was the case in *Regina* v. *Ballivos*, &c. *de Beverley*, 1 P. Wms. 207.

it is seldom resorted to, and that so little is to be found in the books respecting it. It has been said to be nearly obsolete[l].

A very important part of the Chancellor's common law authority respects,

3. *The ordering or directing Writs to be made out by the Cursitors.*

All *original writs* are awarded out of the Chancery by the Chancellor; and his power, in this respect, is defined by the common law; and if he exceeds his authority, or does not pursue it in such order as the law has appointed, the party by exception may abate such writ[m]. The work entitled *Register Brevium*, contains the particulars of all the writs, nearly two hundred in number, issued by the Chancellor; and it has been most ably commented upon by *Fitzherbert* in his *Natura Brevium*, which book, together with the commentary upon it, by Sir *Matthew Hale*, has completely exhausted the subject.

On account of its thus issuing of writs, the court of Chancery in process of time was termed the *forge* and *shop* of all originals[n], *officina justitiæ:* writs issued from thence at all times, and the fountain of justice was always accessible to the king's subjects. The manner in which the business there was conducted seems to be thus: the party complaining to the justices of the King's court for relief, used to be referred to the *Chancellor* (in person, perhaps, originally)

[l] 1 Woodes. Lect. 125.
[m] Plowd. Rep. 74.
[n] Lambard's Archeion, p. 48.

and related to him the nature of his injury, and prayed some method of redress, and thereupon the Chancellor framed a writ so as to obtain him the specific redress he wanted. When this had been long the practice, such a variety of forms had been devised, that there seldom arose a case in which it was required to exercise much judgment: the old forms were adhered to, and became precedents of established authority in the Chancellor's office. At length the making of writs grew to be a matter of course, and the business very much increasing, it was confided to the Chancellor's clerks, called *clerici cancellariæ*, and since, *cursitores cancellariæ*. A strict observance of the old forms rendered them so sacred, that in time any alteration of them was esteemed an alteration of the law, and therefore could not be done but by the *Great Council;* nor was it unusual for a plaintiff, where no writ could be found in Chancery that suited his case, to apply to Parliament for a new one*.

These applications were so inconvenient that the statute of *Westminster* the second was passed, (13 *Edw.* 1. *c.* 24.) by which it was provided that, " whensoever from thenceforth in one case a writ shall be found in the Chancery, and in a like case, falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks of Chancery shall agree in forming a new one, and if they cannot

* See Reeves's History of the English Law, 1 vol. p. 60.

agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors[o]." This statute, says *Blackstone* (somewhat hastily) "with a little accuracy in the clerks of the Chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ, might have effectually answered all the purposes of a court of equity, except that of obtaining a discovery by the oath of the defendant[p]."

New writs were afterwards framed in pursuance of this statute, but always with great care and attention; the Chancellor, sometimes, asking the advice of the Chief Justices of both Benches, and the Chief Baron of the Exchequer[q].

These *original writs* are returnable into the *King's Bench* or *Common Pleas*. The writs returnable into the *Common Pleas*, are generally all original writs, as well in *real* as *personal* actions. The writs returnable into the *King's Bench*, are, 1. *Assizes of novel disseisin*, in the same county where the bench sits; 2. Writs that suppose a personal wrong or force, as *trespass vi et armis*, *ejectione custodiæ*, *ravishment of ward*, *ejectione*

[o] I have quoted Sir *William Blackstone's* translation of the stat. in preference to the common translations; see 3 vol. Comment. p. 50,1.

[p] Com. 3 vol. p. 51.

[q] See Paine v. Sidney, Dyer 208. noticed, 1 Sch. and Lefr. 77.

firmæ vi laicâ; 3. All writs or suits for the king, whether real, personal, or mixt, as writs of right[r]; 4. Writs of *quare impedit*, *quare non admissit*, *&c.* though, saith Sir *Matthew Hale*, some books are contrary, and therefore this hath been ordinarily in the *Common Pleas;* 5. Writs of replevin; 6. Actions of conspiracy, actions upon the case, and regularly all writs in personal actions, except debt, detinue, covenant, account, and, in some instances, writs of annuity[r].

Some original writs pay a fine to the king; as all writs in real actions, assizes, &c. and personal actions, as in debt.

Many of the writs above enumerated are not now employed; for the proceeding in *Ejectment*, introduced in the reign of Henry the Seventh, has in a great degree occasioned the disuse of real actions[s]: so much so, that the writ of *quare impedit* is almost the only real action that remains in common use[t]. Such writs, however, as relate to *personal actions*, are still resorted to. Applications to the Chancellor relating to original writs, are, for the most part, executed by inferior officers, and are so much of course, that they seldom come before the Chancellor in Court for his consideration; but when they do, the Court, as *officina brevium*, judge according to the rules of law[u].

[r] Vid. "Discourse concerning the Courts of King's Bench and Common Pleas, by Lord Chief Justice Hale." Vol. I. *Harg. Tracts*, p. 360.

[s] See Booth on Real Actions; Har. Co. Litt. 239. a. n. 1.

[t] 3 Black. Com. p. 251.

[u] See ex parte *Vennor*, 3 Atk. 770.

Whilst Tenures remained as they were at the common law, they occasioned much business on the common law side of the court of Chancery. And previous to the erection of the *Court of Wards*, in the reign of Henry the Eighth, a great part of the business concerning wardships was transacted in the court of Chancery; and after the institution of that court, and before the taking away of wardships from the Crown, by the statute, (12th of Charles II.) considerable business relating to tenures remained in the court of Chancery by reason of inquisitions returned there, and proceedings upon them [v].

So little is to be found in the Chancery Reports respecting the exercise of the Chancellor's common law authority, that scarcely any thing remains to be added on this head, except some few detached remarks.

1. *The writ de ventre inspiciendo* is obtainable of common right: it is to be found in the *Register*, though not in *Fitzherbert's Natura Brevium*, and is issued for the security of the next heir, tenant in tail [w], or *hæres factus* [x], as a devisee in fee, in tail, or for life [y], to guard them against suppositious births.

The general effect of the cases is, that the court has considered this as a writ for the furtherance

[v] See Judicial Authority, &c.

[w] Ex parte Aiscough, 2 P. Wms. 592. S. C. Mos. 391.

[x] See ex parte *Wallop*, 2 Dick. 707.

[y] See the cases mentioned by Mr. Cox in note (1) to Aiscough's case.

of justice, and that it ought to issue whenever the justice of the case requires it [z].

The writ, it appears, has been issued in cases of *personal* estate [a]; but such an application of it has been considered as a stretch of power [b].

If the widow marry again, yet still the writ may issue; but instead of being placed in the custody of the sheriff, she is permitted to remain with her husband, on his entering into a recognizance that she should not remove from his house, and that some of the women returned by the sheriff should see her every day, and three or more be present at her delivery [c].

The first writ issued on these occasions is to see whether the widow be with child, and *quando paritura;* and if the jury find her with child, then she is (in strictness) removed by a second writ issuing out of the Common Pleas, (where the first is returnable,) to a castle (so are the old authorities), where the sheriff is to keep her safely [d]; but the court has held that there is no occasion to execute the writ in that strict manner, provided people of skill have, from time to time, free access to the widow, and might be present at the birth [e].

II. A *supplicavit* [f] has often been granted by the court, upon articles filed on oath, (an affirma-

[z] Ex parte *Wallop*, 4 Bro. C. C. 98.

[a] See case cited in Mos. p. 391.

[b] Co. Lit. 8 b. n. 3.

[c] Cro. Jac. 685.

[d] Cro. Jac. 685, 6.

[e] See ex parte *Aiscough*, 2 P. Wms. 594.

[f] As to this writ, see F. N. B. 183.

tion will not do [g],) of assault and battery, and that the party goes in fear of his life; but latterly, it seems, the writ has been refused, and the party grieved directed to apply to the justices of the peace [h]. In a very early case (in 1631) where exceptions were taken to the articles as being too general, and production of a certificate of good behaviour, the Court referred it to two justices of the peace to examine the truth of the articles and certificate, and that the question of the *supplicavit* should be stayed in the mean time [i]. The Court, it seems, uses a discretion on the subject [k]; but in general, the Court of Chancery and also the King's Bench, in case of articles of the peace, at the end of a year, if nothing new happens, discharge a party committed for want of finding sureties [l]. Sometimes the security is lessened [m], and the master is directed not to be strict as to the abilities of the sureties [n]; but the court will not discharge a *supplicavit* on an affidavit denying the facts, for it will not try them on affidavit; but where combination or contrivance appear, the *supplicavit* will be discharged [o].

III. With respect to the *Writ of Certiorari* [p], it

[g] Ex parte *Grumbleton*, 2 Atk. 70.

[h] *Clavering's* case, 2 P. Wms. 202. As to the authority of justices of the peace in these cases, see F. N. B. 187.

[i] *Snelley* v. *Flatman*, 1 Dick. 6.

[k] Ex parte *King*, Ambl. 334.

[l] *Baynum* v. *Baynum*, Ambl. 64.

[m] Id. ibid.

[n] Ex parte Sir *R. Grosvenor*, 3 P. Wms. 113.

[o] Ex parte *King*, Ambl. 240. S. C. 2 Vern. 578.

[p] For the general doctrine as to a writ of *certiorari*, see F. N. B. 548.

has been holden, that where a *replevin* is in a Court of record, it may be removed by a *certiorari*, issuing either out of the Court of King's Bench, or the Court of Chancery[q]. Where a *certiorari* issues with a view to use the record as evidence, the tenor, if returned, is sufficient, and countervails the plea of *nul tiel record*; but when the record is to be proceeded upon, the record itself must be returned[r]; and there is no difference when the proceeding upon the record is to be removed, whether it be before judgment, or after, for in both cases the record itself must be removed[s].

IV. As to *Writs of Prohibition*[t], it has been determined that, if one be sued, in an inferior court, for a matter out of its jurisdiction, the defendant may either have a *prohibition* from one of the common law courts of Westminster-hall, or, as this may happen in a vacation when only the Chancery is open, that Court may be moved for a prohibition[u], upon a petition[v], and affidavit[w], that the fact arose out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused[x]. But if it appears on the face of the declaration, that the matter is out of the juris-

[q] F. N. B. 554. *Woodcraft* v. *Kinaston*, 2 Atk. 317. S. C. 1 Dick. 253.

[r] F. N. B. 548, n. a. 2 Atk. 318.

[s] *Woodcraft* v. *Kinaston*, 2 Atk. 318. Salk. 147. 565.

[t] The doctrine as to writs of *prohibition* is set forth at large in F. N. B. 93. &c.

[u] *Iveson* v. *Harris*, 7 Ves. 254.

[v] See *Hill* v. *Turner*, 1 Atk. 516. *Newhouse* v. *Milbank*, 1 Vern. 276.

[w] *Walker* v. *Vanderheide*, 1 Dick. 356.

[x] Ib. and *Anon.* 1 P. Wms. 476, 7.; but see, on this subject, *Iveson* v. *Harris*, 7 Ves. 251.

diction of the court, then a prohibition will be granted without an oath of having tendered the foreign plea [y].

A *prohibition* does not lie to an inferior court after the defendant has pleaded there; for, by pleading, the defendant submits to the jurisdiction. But at the instance of the king a prohibition lies, though the defendant has pleaded. If a prohibition has been granted, the court will issue a *supersedeas*, if there is an affidavit that the cause arose within the jurisdiction [z].

If a *prohibition* has been granted by the court of Chancery *improvidé*, the court will grant a *supersedeas* [a]; but the inferior court must obey the writ, whether improperly issued or not: it has no discretion; to disobey it would be a contempt [b].

The Spiritual Court has jurisdiction over Grammar Schools; but in a case where the libel was for teaching schools generally, without saying what school, the Chancellor granted a *prohibition* [c].

So, if the Spiritual Court has granted administration to a wrong person, resort may be had in vacation time to the Chancellor, for a prohibition, returnable into the King's Bench or Common Pleas [d].

If a Court of Prize, or other inferior court, misconstrue their jurisdiction, it is, it seems, a ground of *prohibition* [e]; but where a question is incidental

[y] 1 P. Wms. 476.
[z] *Anon.* 1 Vern. 301.
[a] 1 P. Wms. 476.
[b] *Iveson* v. *Harris*, 7 Ves. 254, 5.
[c] *Cox's* case, 1 P. Wms. 29.
[d] *Blackborough* v. *Davis*, 1 P. Wms. 43.
[e] Arg. in the case of the Danish ship *Noysomhed*, 7 Ves. 595.

to the principal question, a Court of Prize has jurisdiction, and a prohibition will not be granted [f].

V. The *teste* of original writs against hundreds, corporations, heirs, and in several other cases, is, by the practice of the cursitors, the same day the writs are bespoke [g]. But it is not so with all writs; and where a capias was taken out on the 31st of January, and the original on which it was founded made out on the same day, but *tested* on the preceding 16th of October, the common teste-day before Michaelmas Term, and the defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*, and then moved that the *teste* of the writ might be altered and made the 31st of January, the motion was refused [h].

VI. *Writs of error* are due *of right* in all cases except *treason* and *felony* [i]; and *writs of error* in *criminal cases*, will be ordered to be sealed, provided they are first signed and allowed by the *Attorney General* [k].

VII. The Chancellor will not order a *mandatory writ* to the Chief Justice of the King's Bench to sign a *bill of exceptions*, though such a writ has issued to a judge of an *inferior* court, the judge of the Sheriff's Court in London [l], for instance.

[f] Case of the Danish ship *Noysomhed*, 7 Ves. 593.

[g] *Price* v. *Hundreds of*, &c. 1 P. Wms. 437.

[h] Robinson v. Stevenson, Ambl. 375.

[i] 2 Salk. 504.

[k] *Crawle* v. *Crawle*, 1 Vern. 170; and see what is said in the *Rioters' case*, 1 Vern. 176. 3 Mod. 42. Sid. 69. Ld. Raym. 154.

[l] The *Rioters' case*, 1 Vern. 175.

VIII. An *original*, will on petition, be allowed to be filed, after a writ of error brought to reverse a judgment, where the omission proceeds from the mistake or illness of the attorney, but not where it arises from the ignorance of the clerk [m]. Slender excuses have been admitted [n]. Such permission, also, has been given in cases of *quare impedit*, and in actions against the hundred for a robbery, where the suit must be commenced within a limited time; and where the time had been so far elapsed as that the statute of limitations had been a bar, if the judgment should be reversed [o].

IX. It has been said that after a writ has once issued, it is *de officio*, and the Chancellor has nothing further to do in it [p]. But this doctrine does not seem warranted by the cases. It seems to be admitted that the Chancellor may quash a writ *before* it is *returned* [q] but not *after* [r]; nor before it is returned, unless error appears on the face of it [s]; and even then the properest way, it seems, would be by plea in the court where it was returnable [t].

But a writ though returned, may on application be *superseded* by the Chancellor [u].

[m] *Anonymous*, 1 P. Wms. 411.

[n] *Anonymous*, 3 P. Wms. 314.

[o] 1 P. Wms. 412. and see 3 Lev. 347.

[p] *Anonymous*, 2 Atk. 237.

[q] Rex v. Burrard, 1 P. Wms. 435.

[r] Ex parte Little, 3 Atk. 479. and see King v. Fowler, Salk. 293. and Trebec v. Keith 2 Atk. 498.

[s] Ogyer v. Haywood, Ambl. 59.

[t] Weaver's Company v. Hayward, 3 Atk. 363.

[u] Lessee of Lawlor v. Murray, 1 Sch. and Lefr. 76.

An executrix, in custody under a *Writ de excommunicato capiendo* [x] for not appearing to a citation by a creditor to exhibit an inventory, moved for a *supersedeas*, disputing the debt upon equitable grounds; but the court refused to supersede the writ, and said, it followed of course upon the *significavit* [y].

And a *supersedeas* to a writ *De excommunicato capiendo* has been denied, though the *significavit* was general and uncertain; the method to proceed being by *habeas corpus*; but where an *appeal* was brought, a *supersedeas* has been granted [z].

If a cursitor alters the return of an original, the writ will be *superseded* [a], unless it is only altered as to mistakes merely literal and verbal, and it is resealed [b].

A writ of error may be superseded by the Chancellor, *quia improvide emanavit* [c].

A writ of *Ad quod damnum* has been quashed for insufficiency in the equivalent required [d], and has been set aside for surprize in the execution of it [e].

According to Sir Edward Coke [f], in all those cases where a man is excommunicated by the

[x] See as to this writ, F. N. B. 144.

[y] The King v. Blatch, 5 Ves. 113.

[z] Rex v. Sneller, 1 Vern. 24.

[a] Weaver's Company v. Hayward, 3 Atk. 362. and see ibid. p. 600.

[b] Smith v. Wilmer, 3 Atk. 595.

[c] Dean of Dublin, &c. v. Dowgate, 1 P. W. 351.

[d] Exparte Armitage, Ambl. 294.

[e] Exparte Venner, 3 Atk. 766.

[f] 12 Co. 67. title "Prohibition."

Bishop against law, he shall have a writ out of Chancery directed to the Bishop, commanding him to *assoil* him [g].

X. With respect to *patents*, it has been holden that on an application to the Lord Chancellor to withhold the Great Seal from a patent, he will only consider whether it is legal or not, and not whether the Crown ought or ought not to grant it [h]; but there are three stages in which it may be opposed: 1st, While it is under the consideration of his *Majesty;* 2d, When it comes to the *Privy Seal;* and 3d, When it comes to the *Great Seal* [i].

Since the union of Great Britain and Ireland the Great Seals are kept distinct for patents [k].

The Chancellor will not sign a patent for a theatre, which does not put the parties under some controul, even though there should be no *caveat* against it [l]; and the Court has expressed itself as cautious how it affixes the Great Seal to a patent for a grant of *Warden of the Fleet*, as it may occasion a general escape of the prisoners [m].

It has been holden, also, that after a *patent* has passed the Great Seal, the time for enrolment cannot be enlarged without an act of parliament [n]: if, however, the enrolment was delayed by mistake, a new patent might be obtained, and

[g] 7 Edw. 4. 14. Boraine's Case, 16 Ves. 346.

[h] Ex parte Daly, Vern. & Scriv. 499.

[i] Ib.

[k] Oxford and Cambridge Universities v. Richardson, 6 Ves. 705.

[l] Ex parte O'Reiley, 1 Ves. jun. 113.

[m] Col. Leighton's case, 2 Vern. 174.

[n] Ex parte Koops, 6 Ves. 599.

the officers, probably, induced to remit their fees [o].

XI. *Coroners* may be removed by the Chancellor, where they misbehave or live out of the county; but as theirs is an office of freehold, the court will not, when the Coroner goes out of the way, order a writ to issue *De coronatore exonerando*, until there is an affidavit of service at the last place of his abode: nor does the authority of the court extend so far as to appoint another coroner; but the choice of the new one must be by a majority of freeholders [p].

XII. A writ of *Replevin* [q] may be obtained, not merely where there has been a *distress*, as is generally imagined, but in all cases where a person takes goods out of the possession of the person who applies for the writ, upon his giving security, until it shall appear whether the goods are rightfully taken; but if *A.* be in possession of goods in which *B.* claims a property, *Replevin* is not the proper writ to try that right [r].

The court will not, on motion, supersede a writ of Replevin, unless a fraudulent use is made of it [s].

XIII. A writ *De cautione admittanda* [t], will not be allowed to issue, unless it appears upon affidavit,

[o] Ex parte Beck, 1 Bro. C. C. 578.

[p] 3 Atk. 184.

[q] For the doctrine as to a writ of Replevin, see F. N. B. 155.

[r] In re. Wilson, 1 Schoales and Lefr. 321. n. Ex parte Chamberlaine, 1 Sch. and Lefr. 320. Shannon v. Shannon, ib. 327.

[s] Anon. 2 Atk. 237.

[t] See as to this writ, F. N. B. 144.

that the Bishop has refused to admit of caution [u].

XIV. The writ *De homine replegiando* is an original, suable of right, on petition or motion, and returnable in a court of law [x]. Two persons may join in suing out this writ [y]. It is not supersedeable in Chancery; but the party must plead to it, in the court where it is returnable [z]. A wife, it has been determined, cannot obtain this writ against her husband [a].

XV. The writ of *Melius inquirendo* is another of the common law writs issued by the Chancellor, and noticed in *Fitzherbert's Natura Brevium* [b].

In regard to this writ, it has been holden that, if a person is found by office not to be an alien, this is not conclusive on the Crown, but a *Melius inquirendum* may issue; upon which, if the party is again found not to be an alien, the Crown is bound [c].

XVI. Writs of *Ne exeat regno*, writs of *Injunction*, writs of *Certiorari*, and by way of process, or for the enforcement of process, will be elsewhere considered.

XVII. It has been observed in an able controversial work [d], said to be composed by *Mr. Yorke*, (afterwards *Earl of Hardwicke* [e]), that there is

[u] Archbishop of York v. ———, 1 Vern. 119.

[x] Treblecock's case, 1 Atk. 633.

[y] F. N. B. 66. F.

[z] 1 Atk. 683.

[a] Atwood v. Atwood, Prec. Ch. 492.

[b] P. 572.; and see 36 Edw. 3. c. 13. 2 & 3 Edw. 6. c. 8.

[c] Exparte Duplessis, 2 Ves. 538. &c. and p. 555.

[d] Judicial authority of the Master of the Rolls, p. 83.

[e] See Bishop Hurd's Life of Warburton.

no one species of all the judicial acts performed on the common law side of the court of Chancery, of which there are not instances of their being also performed by the Master of the Rolls; but this has been a matter of much controversy, and it has been as positively said, and it seems to be the better opinion, that the Master of the Rolls has no original jurisdiction respecting matters arising on the common law side of the court of Chancery [f].

The view, thus taken, of the Chancellor's common law jurisdiction is necessarily very limited; being, as before observed, confined to such parts of it as have come into discussion in the court of Chancery. It would require a volume, to particularize and describe it, in its full extent.

[f] Lloyd v. Scott, 2 Dick. 576. See also, History of the Chancery, and Legal Judicature, &c.

CHAP. II.

EQUITY JURISDICTION OF THE CHANCELLOR.

BY the generality of the older writers, the Equity Jurisdiction of the Chancellor is described under three heads—*Fraud*, *Trust* and *Accident*; but by the word *Accident*, they usually mean, when a case is distinguished from others of the like nature by unusual circumstances[a].

It will, however, be more convenient to consider the *Equity Jurisdiction* of the Chancellor (except what relates to the Practice, which will be treated of hereafter) under the following heads :

1. *Accident and Mistake.*
2. *Account.*
3. *Fraud.*
4. *Infants.*
5. *Specific Performance of Agreements.*
6. *Trusts.*

According, even to this enlarged classification of the subject, it may not be very obvious how the great multiplicity of doctrines arising out of the Equity Jurisdiction, can be included; but on consulting the divisions and subdivisions of each head, it will be found, that, without any very arbitrary classification, they include every branch of Equity.

[a] See Lucas, 1. 3. Prec. Ch. 251.

1. *Accident and Mistake.*

I. It is not under the very extended signification of the term, *Accident*, before alluded to, that the subject is now intended to be treated of, but only according to its ordinary and more restrained sense.

The Jurisdiction of the Chancellor in cases of *Accidents* has been long established[b]: they appear to have been relieved against in the reign of Henry VII.[c] and from *St. Germain's* Book, *Doctor and Student*, as well as from Sir *George Cary's* Reports[d], it appears, they continued to be relieved against in the succeeding reign, and now, certainly, form an acknowledged branch of Equity Relief.

Where a *Bond* is *lost*, (unless it be a voluntary Bond[e],) relief will be given in Equity[f]; but no relief is given there, upon a *lost note*[g]: and the reason is, that at law, the party could not recover without a *profert*, and giving *oyer* of the bond[h]; but *profert* and *oyer* was not necessary to recover at law upon a *lost note*[i]: proving of the contents

[b] East India Company v. Boddam, 9 Ves. 466.

[c] Pasch. 7 Hen. VII. p. 12.

[d] P. 2.

[e] Underwood v. Slaney, 1 Ch. Cas. 77.

[f] Toulmin v. Price, 5 Ves. 238.

[g] Mossop v. Eadon, 16 Ves. 430.; and see Glynn v. Bank of England, 2 Ves. 41.; but see what is said in Toulmin v. Price, 5 Ves. 238. and Walmesley and Child, 1 Ves. 341. By 9 and 10 Wm. 3. c. 17. s. 3. relief was given at law in the case of a lost Bill of Exchange.

[h] See 1 Ves. 393. and 2 Ves. 41.

[i] Walmesley v. Child, 1 Ves. 345. and see Glynn v. Bank

being sufficient, and nothing standing in the plaintiff's way. And though, of late years, Courts of Law, in the case of a *lost Bond* have dispensed with a *profert and oyer*[k], a doctrine, which when first broached, seems to have startled Lord Hardwicke[l], and has excited much surprize in subsequent Judges[m]; yet Courts of Equity having once had jurisdiction, they still insist on retaining it, though the original ground of the Jurisdiction, the inability to recover at Law, no longer exists[n].

A Court of Equity will not only give relief against the Principal, where a bond is lost[o], burnt, or cancelled by accident or mistake, but will also set it up against a *surety* in such Bond[p]; and this, though the Principal be out of the Jurisdiction of the Court[q]. So, where a *Rent-charge* is granted by deed, and the deed happens to be lost, a copy cannot be read in evidence at law; because the party must declare with a *profert hic in curia*, as the defendant is entitled to *oyer* of the original: so that the plaintiff must either set up a prescriptive title to the Rent, from a con-

of England, 2 Ves. 41. and Snellgrove v. Bailey, 3 Atk. 214.

[k] See Read v. Brookman, 3 T. R. 151. Hendy v. Stephenson, 10 East 55. See also, as to a burnt bond, Routledge v. Burrel, 1 H. Black. 254. Totty v. Nesbit, 3 T. R. 153.

[l] See Whitfield v. Faussett, 1 Ves. 389. &c. and what he had previously said in 2 Atk. 61.

[m] See what is said Exparte Greenway, 6 Ves. 812, 813. and in East India Company v. Boddam, 9 Ves. 464.

[n] See what Lord Thurlow says in Atkinson and Leonard, 3 Bro. 218. and see East India Company v. Boddam, 9 Ves. 464. &c. Bromley v. Holland, 7 Ves. 19.

[o] East India Company v. Boddam, 9 Ves. 464. the case of a lost bond; see Pickering v. Keeling, 1 Ch. Rep. 78. Bonnam v. Newcombe, 2 Ventr. 365. Lee v. Sir Robert Henley, 1 Vern. 37.

[p] Skip v. Huey, 3 Atk. 93. the case of a burnt bond.

[q] East India Co. v. Boddam, 9 Ves. 464.

stant and uninterrupted payment, or he must bring a bill to be relieved against the accident of the original's being lost [r].

The Court, however, to prevent fraud, has in the cases of lost securities, prescribed conditions, on which they administer relief.

If a Deed or Instrument, upon which the demand arises, is lost, and only a *discovery* is sought, an affidavit of the loss is unnecessary [s]; for it cannot be supposed a man would bring a Bill only for a discovery of a deed he was possessed of; but if *relief* is prayed beyond the discovery, e. g. to have payment of the debt [t], or the re-execution of a lost deed [u], an affidavit of the loss must be annexed; and the want of it, would be a ground of demurrer [w]. If the deed lost concerns the title of lands, and possession is prayed to be established, such affidavit must be annexed. So, on the loss of a Bond, and a Bill filed, in consequence, to be paid the amount, a Bill of Discovery is not sufficient; but it must be, to be paid the money thereon, and an affidavit must be annexed [x].

And, it seems, that in cases of this description, a Trial at Law will be directed, if the Defendant insists upon it [y].

[r] 2 Atk. 61.

[s] Whitworth and Goulding, 1 Eq. Abr. 14. S. C. 2 P. Wms. p. 541. Godfrey v. Turner, 1 Vern. 247. 1 Ch. Cas. 11. Anon. 1 Vern. 180. Prec. Ch. 536.: the case contra, 1 Vern. 59. seems a mistake.

[t] 1 Vern. 247. 1 Cha. Cas. 231. Whitchurch v. Golding, 2 P. Wms. 541.

[u] Rootham v. Dawson, 3 Anst. 859.

[w] Nicholson v. Pattison, 1 Vern. 310.

[x] Walmesley v. Child, 1 Ves. 344,5. Teresey v. Gory, Finch, 301. Anon. 2 Freem. 71.

[y] Clavering v. Clavering, 2 Ves. 233.

It appears to be upon the principle of relieving against accidents, by loss of deeds, that grants are, in many cases, presumed or supplied. Where, therefore, a person has been in possession for a great length of time without interruption, Equity will supply all those circumstances, or formal ceremonies, which the Law deems necessary to the operation of the original conveyance; as Livery, a Surrender [z], &c. and will not allow such possession to be disturbed [a]. So, where rent has been paid twenty years, Equity will presume a grant [b]. And where a Common has been inclosed for thirty years, Equity will presume the Inclosure to have been with the consent of all persons interested, and will not allow it to be thrown open [c].

And where a man is intitled to a rent out of lands, as *Chief Rents*[d], or *Quit Rents*[e]; and from length of time the remedy at law is lost, or become very difficult, the Court of Chancery has interfered and given relief, upon the foundation only of payment of the rent for a long time, which bills are called Bills founded upon the *solet*. The Court has even gone so far, as to give relief, where the nature of the rent, as there are many kinds at law, has not been known, so as to be set forth: but then all the terre-tenants of the lands, out of which the rent issues, must be

[z] Lyford v. Coward, 1 Vern. 195.

[a] Ibid.

[b] Steward v. Bridger, 2 Vern. 516.

[c] Silway v. Compton, 1 Vern. 32.

[d] Duke of Bridgwater v. Sir Francis Edwards, 6 Bro. P. C. 368. Tomlins' Ed. and see Eton College v. Beauchamp, 1 Ch. Cas. 121. 1 Eq. Abr. 32 (B) and 364.

[e] Holder v. Chamburgh, 3 P. Wms. 257; but see North v. Earl of Strafford, 3 P. Wms. 148. Duke of Leeds against New Radnor, 2 Bro. C. C. 340. and 518.

brought before the Court, the better to enable it to make a compleat decree[f].

So, where there is a clear right to rent, but no remedy at Law, as no demesne Lands on which to distrain, Equity will give relief[g]; as it will also, where, from a confusion of Boundaries, no Land can be found for a distress[h].

On the same ground, of accident, a Lord of a Manor may file a Bill for a Commission to distinguish Copyhold Lands within the Manor from Freehold, and compounded from uncompounded Copyholds, and to ascertain the boundaries; and if they cannot be distinguished, to set out Lands of the Tenant of equal value with so much of the Copyhold Lands as cannot be distinguished[i].

And though, in cases of Bills to ascertain Boundaries, the interest of one party is more inconsiderable than the interest of another, yet they must equally bear the expence of a Commission to settle Boundaries, and the separating of Freehold and Copyhold Land[k].

Equity relieves against *penalties*, and originally, it is apprehended, on the ground of accident. It relieves, for instance, against non-payment of money at a certain day[l], as in the common case of a bond for the payment of money, or of a Mortgage, where the Title of the Mortgagee has become absolute at Law. It relieves also against forfeitures of

[f] Benson v. Baldwyn, 1 Atk. 598. and see Bouverie against Prentice, 1 Bro. C. C. 200.

[g] Duke of Leeds v. Powell, 1 Ves. 171.

[h] Ib. 172.

[i] Duke of Leeds v. Earl of Strafford, 4 Ves. 180.

[k] Norris v. Le Neve, 3 Atk. 83.

[l] See Grimstone v. Lord Bruce, 2 Vern. 594. Sir Henry Peachy and Duke of Somerset, 1 Str. 453. Sloman v. Walter, 1 Bro. C. C. 418.

copyholds. Relief, however, is dispensed only in those cases where the Court can do it with safety to the other party; for, it seems, if it cannot put him into as good a condition as if the agreement had been performed, the Court will not relieve[m]. It will only relieve where *the thing may be done afterwards*, or a *compensation made for it*[n]; but unless a full compensation can be given, so as to put the party precisely in the same situation, a Court of Equity will not interfere; for such a Jurisdiction would be arbitrary[o]. There are some exceptions to this rule; one of which is, where a *voluntary composition* is to be paid at a time certain, and in a certain manner. In such case, it is the voluntary bounty of the creditor to remit part of the debt, and the terms must be strictly complied with[p].

Where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the Deed, and the penalty only as accessional, and therefore only to secure the damage really incurred: and in such cases, if the penalty of the bond is sued for at law, an injunction will be granted, and an issue, *quantum damnificatus* will be directed[q].

[m] Rose v. Rose, Ambl. 332.

[n] Cage v. Russell, 2 Ventr. 352. Descartott v. Dennet, 9 Mod. 22. Davis v. West, 12 Ves. 475. and see Wadeson v. Calcraft, 10 Ves. 67. Hill and Barclay, 18 Ves. 63.

[o] Sanders v. Pope, 12 Ves. 291. Wafer v. Moccato, 9 Mod. 112, 113.

[p] Rose against Rose, Amler, 332.; and see Sewell v. Masson, 1 Vern. 210. 1 Ch. Cas. 110. Exparte Bennet, 2 Atk. 527. Leigh v. Barry, 3 Atk. 585. Mackensie v. Mackensie, 16 Ves. 372.

[q] Sloman against Walter, 1 Bro. C. C. 418.

It has been said, that if there be a mortgage at 5 per cent. with a condition to take 4 per cent. if regularly paid; or a mortgage at 4 per cent. to have 5 per cent. if not regularly paid, the 5 per cent. is regarded in Equity only as a *penalty* to secure the 4 per cent.; and the party is relieved from paying the 5 per cent. by paying the 4 per cent. and putting the other party in the same condition as if the 4 per cent. had been paid: that is, by paying him Interest upon the 4 per cent. as if it had been received at the time[s]. This position, however, in its full extent, does not seem warranted by the authorities; and the rule rather appears to have been, that if money be lent on mortgage at 4 per cent. Interest, but if not punctually paid, then to pay Interest at the rate of 5 per cent. a Court of Equity will consider the 5 per cent. but as *nomine pœnæ*, and relieve[t], unless there has been a long arrear of Interest[u]; but where Interest is reserved at 5 per cent. and if duly paid, 4 per cent. to be accepted, and it is not punctually paid, the Court will not relieve[x]; because this latter agreement, though substantially the same, is not in the form of a penalty[y].

Where a Bond was given for the performance of covenants to build a bridge, which, from circum-

[s] Seton v. Slade, 7 Ves. 273,4.

[t] Holles v. Vyse, 2 Vern. 290. Strode v. Parker, 2 Vern. 316.

[u] Brown v. Barkham, 1 P. Wms. 652.

[x] 2 Vern. 290. Hallifax and Higgins, 2 Vern. 134. Strode and Parker, ib. 316. Jory v. Cox, Prec. Ch. 160. Nicholls v. Maynard, 3 Atk. 520. 3 Bl. Comm. 432.

[y] See Arg. 2 vol. Hargr. Jurisconsult. Exercitations, 218.

stances became impracticable, and the sum agreed for, actually paid, an Injunction was granted to restrain an action on the bond, and an Issue, *Quantum Damnificatus*, was ordered, the sum mentioned in the Bond being considered as a Penalty[2].

The *construction* of *Covenants* is the same in Equity as at Law, but the *performance* of them is considered very differently in Courts of Law and Equity. At *Law*, a Covenant must be strictly and literally performed: in *Equity*, it is sufficient if it be really and substantially performed according to the true intent and meaning of the parties, so far as circumstances will admit; but if by unavoidable accident, if by fraud, by surprize, or ignorance, not wilful, parties have been prevented from executing it literally, a Court of Equity will interfere: and upon compensation being made, the party having done every thing in his power, and being prevented, by the means alluded to, will give relief. This doctrine was formerly carried to a length that became in some degree alarming; terms and conditions of Covenants having been construed, as only *in terrorem;* but in modern times that has been much restrained; and it is now perfectly understood that even in the purchase of an estate, if money has been covenanted to be paid at a given day, if it is not paid at the day, at law, an action will lie; but if the party can shew, that he took the means of paying it, and has been prevented by accidents not in his power, the

[2] Errington against Aynesly, 2 Bro. C. C. 341.

Court will dispense with the strict performance of it; because, as it was formerly said, it is not of the essence of the contract; but it may be of the essence of the contract: and the party cannot avail himself of equitable circumstances, unless he shews that there has been no wilful neglect or misconduct on his part[a].

In a case where, previous to *Lord Stanhope's* Act, a tender was made, in *Bank Notes*, of Rent secured by covenant, and from pique was refused, and payment in *Coin* insisted upon, and a distress made; a Bill was filed for relief, on the ground of the great scarcity of Coin, and the difficulty of procuring it, and for an Injunction in the mean time; but the Master of the Rolls, (*Sir William Grant*) sitting for the Chancellor, refused the Injunction, because he thought the Party could not be relieved against his covenant, and that to relieve him would be to assume a legislative authority[c].

Where a Lease for Life, or for Years, is made upon a condition of Re-entry for a Forfeiture, or that the Lease shall be void, if the Lessee *assigns or aliens it without Licence*, and, afterwards, the Lessee assign it without Licence, this is a Forfeiture, and such a Forfeiture against which the court will not relieve, because, it is said, it is unknown what shall be the measure of the damages[e].

[a] Eaton v. Lyon, 3 Bro. 692, 3.

[c] Bray v. ———, Seal, 25th June 1812. MSS.

[e] Wafer v, Moccato, 9 Mod. 112. quot. by Lord Chan. in Sanders v. Pope.

If, after such a covenant, the Lessee dies indebted, and his Executors sell the Lease for payment of the debts, Equity will, in favor of creditors, relieve against the Forfeiture [f].

But though the Court does in many cases relieve against a *Breach of Covenant*, yet there is no branch of the Jurisdiction of the Court more delicate than that which goes to restrain a legal right [g], and it has been termed a dangerous Jurisdiction [h].

In cases of a contract by Lease to pay Rent, with a Covenant and clause of Re-entry on non-payment, a Court of Equity will relieve the Tenant on payment of the Rent, with Interest and all Expences, (an inadequate Relief,) and will not let him be turned out of Possession [i], for in such cases it is said (not convincingly perhaps) that the loss is certain, and may be recompensed by damages.

So, relief has been given against a Forfeiture, and a right of Re-entry, incurred by not laying out, according to covenant, a specific sum *in repairs*, in a given time [k]. And in a case where the Tenant had omitted to keep the Premises in Re-

[f] 1 Ch. Cas. 170.

[g] See Sanders v. Pope, 12 Ves. 289.

[h] Hill v. Barclay, 16 Ves. 406.

[i] Francis's Max. in Equity, Sanders v. Pope, 12 Ves. 289. and see Davis v. West, 12 Ves. 475. Descartott v. Dennett, 9 Mod. 22. Hill and Barclay, 18 Ves. 58. 59. 60. and see Taylor v. Knight, Vin. Abr. tit. Chancery, (V.) Ca. 31. The same Relief may be had at Law under the Stat. 4 G. 2. c. 28. s. 23, 4.

[k] Sanders v. Pope, 12 Ves. 282. and see Brown and Quilter, Ambl. 619.

pair, as he had covenanted to do, and an Ejectment was brought on the usual clause of Re-entry, and Possession taken, Relief was given[l]. But *Lord Eldon* seems not to have concurred in these decisions, or to admit that Relief could be administered, unless in cases of Accident and Surprize; the effect of Weather, for instance, or permissive want of repair, the Landlord standing by and looking on[m]; and it seems clear that if the Tenant's conduct with reference to his covenant has been *gross and ruinous*, Relief would not be given to him[n]; nor will relief be granted, if the Premises being much out of repair, and the Landlord making a requisition to repair, the Tenant refuses to comply[o]. Wherever, indeed, there has been a *wilful, voluntary, breach* of a Covenant, a Court of Equity will not relieve[p].

In one case, where the Lessee covenanted to pay the Rent and to repair, and he, afterwards, made 100 under Leases, and the Rent was behind, and the Premises out of repair, and the original Lease was avoided at Law for the non-payment of Rent, Relief against the Forfeiture was given in Equity, on a Bill filed by some of the under Lessees, and their payment of the Rent in arrear and repairing the houses, but the Court would not

[l] Hack v. Leonard, 9 Mod. 90.

[m] Hill and Barclay, 18 Ves. 62.

[n] See Hill v. Barclay, 16 Ves. 404.

[o] 18 Ves. 64. 406.

[p] Descartet v. Dennet, 9 Mod. 22. Eaton and Lyon, 3 Bro. 693. Hill and Barclay, 18 Ves. 62.

apportion the Rent, but held that such Lessees might compel the other under Lessees to contribute[q].

Notwithstanding some *dicta*[r] and a decision[s] to the contrary, it appears, at length, to be settled, that if a Tenant covenants to repair, damage by fire excepted, he cannot be relieved from the payment of Rent, if the premises are destroyed by fire[t]; but, it has been said, that if the Tenant in such case offers to surrender his Lease, the Court would relieve[u], but that seems questionable.

If a Covenant be to do, or not to do, some particular act, or doing it, or neglecting to do it, to pay a certain sum by way of *liquidated damages*, Courts of Equity will not relieve against the payment of such damages[v]; as where there is a *nomine pœnæ* in Leases to prevent a Tenant from ploughing[w]. And where a Bond is given not to defraud the Revenue, such fraud is considered as a Crime, and for that reason the Court will not relieve[x].

[q] Webber v. Smith, 2 Vern. 103. See 16 Ves. 406.

[r] See Browne v. Quilter, Ambl. 619.

[s] Steele and Wright, mentioned in Doe v. Sandham, 1 T. R. 708. Camden v. Moreton, cited from MSS. 2 Selwyn Abr. 414.

[t] Hase v. Groves, 3 Anst. 687. Holtzapffel v. Baker, 18 Ves. 115. and see on this subject, Belfour v. Weston, 1 Durnf. and East 310. and the cases there mentioned.

[u] Cutter v. Power, 6 T. R. 623.

[v] Roy v. Duke of Beaufort, 2 Atk. 194. Blake v. East India Company, Finch 117. Rolfe v. Patterson, 6 Bro. P.C. 470. Street v. Rigby, 6 Ves. 818. Astley v. Weldon, 2 Bos. and Pul. 352. Small v. Fitzwilliams, Prec. Ch. 102. Ponsonby v. Adams, 6 Bro. P. C. 417.

[w] Benson v. Gibson, 3 Atk. 395. Woodward v. Gyles, 2 Vern. 119.

[x] Benson v. Gibson, 3 Atk. 396.

If there be a Covenant in a Lease against using Premises as a Shop, or Warehouse for any Trade, without Licence in Writing, and a Trade is carried on without such Licence, the Court will not relieve against an Ejectment. Nor would a Licence to carry on *one* Trade, be considered as a general Licence to carry on *any* Trade [y].

If a *Right of Renewal* of a Lease be forfeited by *Laches* of the Tenant, Courts of Equity will not give relief [z]; but if the Lessee has lost his right by the *fraud* of the Lessor, or *accident* on his own part, Equity will relieve [a]. Cases of this description have been very frequent in *Ireland* [b]; where, it is said, *one seventh* of the whole Landed Property is held under renewable Leases [c]; and it was found necessary to pass an Act of Parliament [d], by which the Tenant is on certain conditions relieved [e].

Where there was a Lessee of a Colliery at the rate of so much *per wey*, and the Colliery became not worth working, the Lessee was relieved against the future Rent, and the Covenant in the Lease to

[y] Macher v. Foundling Hospital, 18 Ves. 188.

[z] Bayley v. Corporation of Leominster, 1 Ves.jun. 470. S. C. 3 Bro. C. C. 529. Baynham v. Guy's Hospital, 3 Ves. 295.

[a] See the Irish cases in the House of Lords, Ripon v. Rowley, 1774. Kain v. Hamilton, 1776. Bateman v. Murray, 1779. and for a History of these Decisions, see Boyle v. Lysaght, Vernon and Scriven's Rep. 135. and Magrath v. Lord Muskerry, ib. 166.

[b] Rawstorne against Bentley, 4 Bro. C. C. 415.

[c] See Arg. Jackson v. Saunders, 1 Sch. and Lefr. 447.

[d] 19 & 20 Geo. 3. c. 30.

[e] See a luminous interpretation of this Act, in Jackson v. Saunders, 1 Sch. and Lefr. 443. etc.

work the Colliery, upon paying for all the Coal that could be got[f].

Conditions Precedents i. e. to be performed before an Estate vests, must, in general, be literally performed; and the Court will never vest an Estate where, by reason of a Condition Precedent it will not vest in Law[g]. In many cases it will relieve to prevent the *divesting* of an Estate, but cannot relieve to give an Estate that never vested[h], unless the Remainder-men who were to take the Estate on non-performance of the Condition, have used any indirect practice or contrivance to prevent the performance of the Condition[i].

Where, therefore, there is a *conditional limitation* over in a given event, in such case (unless the condition be for payment of a certain[k] sum of Money[l], or such as the Court can put the party in the same situation as if the Condition had been performed[m], and it is not contained in a voluntary settlement[n],) the breach of the Condition cannot be relieved[o]. Where an Estate was devised, upon

[f] Smith v. Morris, 2 Bro. C. C. 311.

[g] Popham v. Bamfield, 1 Vern. 83. Lord Falkland v. Bertie, 2 Vern. 333. S. C. 3 Chan. Cas. 129. and 2 Freem. 220.

[h] 1 Vern. 339.

[i] Cary v. Bertie, 2 Vern. 344.

[k] If damages are contingent Equity cannot relieve, Sweet v. Anderson, 2 Bro. P. C. 430.

[l] Wheeler v. Whitall, 2 Freem. 9. Wallis v. Crimes, 1 Ch. Cas. 89. Woodman v. Blake, 2 Vern. 222. Bertie v. Falkland, 2 Vern. 339.

[m] Taylor v. Popham, 1 Bro. C. C. 168.

[n] Bold v. Corbett, Prec. Ch. 84. Woodman v. Blake, 2 Vern. 221. and see 1 Ch. Cas. 52.

[o] Lord Falkland v. Bertie, 1 Vern. 333. Clerk v. Lucy, 5 Vin. 87.

condition that if the first devisee should refuse or neglect to comply with the condition, viz. to release all demands upon the Testatrix, as Executrix of A. or otherwise established, within six Months after her death, with a limitation over; this was held to be a *conditional limitation*, and a failure in not executing the release was held not to be relievable[k]. Nor is Infancy allowed as an excuse for not performing a condition precedent. If such a condition is illegal[l], or is, or becomes, impossible, even by the Act of God, the Estate will never arise, nor can Equity relieve[m].

It is, in general, different, as to *conditions subsequent*, i. e. to be performed after the Estate is vested; for though the Court cannot relieve against *all* conditions subsequent, yet where the Court can in any case compensate the party in damages for the "non-precise performance of the condition," as Lord *Nottingham* expressed it, Equity will relieve[n]. If such condition becomes impossible by the Act of God, the Estate will not be defeated or forfeited[o]. The Rule is the same where the condition subsequent is unlawful[p].

In all those Cases in which a Court of Equity relieves against the legal effect of the *Breach of a condition*, it depends upon the question whether *compensation* can be made; for in

[k] Simpson and Vickers, 14 Ves. 341.

[l] Co. Lit. 206 [a].

[m] Cary v. Bertie, 1 Vern. 340. Graydon v. Hicks, 2 Atk. 18.

[n] Popham v. Bamfield, 1 Vern. 83.

[o] Cary v. Lord Falkland, 1 Vern. 339. Co. Litt. 206. 2 Bl. Comm. 156. 7.

[p] Perkins, Sect. 139.

all cases where a Person has broken a condition and forfeited a Penalty, Equity will relieve if there can be a compensation [q]. But if compensation cannot be given, and the value of the thing for enforcing which the forfeiture is imposed, cannot be estimated, relief is denied [r].

Equity will relieve against forfeitures in consequence of permissive waste [s]; but not, it seems, against wilful waste, though it admits of compensation [t].

Forfeitures which do not admit of compensation, as forfeitures which may be considered as limitations of the Estate, and which determine it when they happen, cannot be relieved against. If, therefore, a Tenant for Life makes a greater Estate than his own; or if a Tenant by Copy affects to convey a greater Estate than by Law he may, they forfeit their Estates; nor will Equity relieve [u].

It has already been said that, relief is given in cases of forfeiture of Copyholds [v]; but where a Copyholder has long refused to do suit, or service, or to repair [w]; and where he has granted leases without licence, relief will be refused [x].

[q] Northcote against Duke, Ambl. 514.; and see Barnardiston v. Fane, 2 Vern. 366.

[r] See Hargr. Jurisconsult. Exercitations, 2 vol. 194.

[s] Sir H. Peachy v. Duke of Somerset, Prec. Ch. 572, 3.

[t] Thomas v. Porter, 1 Ch. Ca. 95. Pre. Ch. 574. But see Northcote v. Duke, Ambl. 514. Nash v. Lady Darby, q. 2 Vern. 537.; cited 1 Fonb. Eq. 387. in note. Bishop of Worcester and others, 2 Freem. 137.

[u] Sir H. Peachy v. Duke of Somerset, 1 Str. 452. S. C. Pre. Ch. 574.

[v] Ante, p. 26, 7.

[w] Cox v. Higford, 2 Vern. 664.

[x] Sir H. Peachy v. Duke of Somerset, Pre. Ch. 568.

It is to be observed that in all those cases where Penalties are inserted in a case of non-performance, this does not release the Parties from their Agreement, but they must perform it notwithstanding, and have not an option to pay the penalty and be released from the performance of the Agreement [x].

The interposition of Courts of Equity against Marriage conditions, in Cases of Legacies, may perhaps be considered as arising out of its power to relieve against Penalties and Forfeitures; but however this may be, the doctrine on this subject will be more conveniently considered when we come to treat of *Legacies* [y].

Relief has been refused against a Forfeiture, under *a Bye Law of an incorporated Company for Water Works*, whereby it was provided, that the Members shall receive notice of the Default in paying a call, and incur a forfeiture by non-payment ten days after the notice sent; though it appeared that the lapse arose from an accidental ignorance of the call [z].

So, it seems, as to Contractors for Government Loans, if a Party fails to make a Deposit, he cannot be relieved in Equity [a], and relief in such case has been refused on an application to Parliament [b].

[x] Howard v. Hopkins, 2 Atk. 371. Chilliner v. Chilliner, 2 Ves. 528. and see Hobson v. Trevor, 2 P. Wms. 191. sed vid. Woodward v. Gyles, 2 Vern. 119.

[y] Post.

[z] Sparks v. the Company and Proprietors of the Liverpool Water-works.

[a] Ib. 434.

[b] Ib. 435.

If a Bill has been filed waiving a forfeiture, and, on that ground, seeking relief in a Court of Equity, though the Plaintiff fail in obtaining that Relief, he will be restrained from insisting on the Forfeiture at Law [c].

It is in general true, that it is not in the power of the Court to relieve against Accidents which prevent *voluntary dispositions* of Estates [d]; but in a great case, it was resolved that, if a Man make a Conveyance with a power of Revocation in the presence of four Privy Counsellors, and he is sent by the King to Jamaica, where that circumstance becomes impossible, Equity will allow him to revoke it, without such presence [e].

Where a Man has an *election*, within a limited period, to settle Lands or pay Money, and the Party dies, and the Testator's affairs are for some time in confusion, nothing, it is said, is more usual, than for the Court to enlarge the time, or relieve against any lapse of it [f].

If the Master of an Apprentice becomes a Bankrupt [g], or dies [h], these, it has been holden, are *Accidents*, in respect of which the Court has Jurisdiction, to order a return of part of the Apprentice

[c] Bond v. Hopkins, 1 Sch. and Lefr. 441.

[d] Whitton v. Russel, 1 Atk. 448.

[e] Bath and Montague, 3 Ch. Ca. 68.

[f] Eastwood v. Vinke, 2 P. Wms. 617.

[g] See Hale against Webb, 2 Bro. C. C. 80.

[h] See Newton v. Rowse, 1 Vern. 460; but see what is said Foubl. Treat. Eq. 1 vol. 372. in note.

Fee; but if the Master and Apprentice agree that the Apprentice shall be discharged from his Apprenticeship, there is no Jurisdiction, on the ground of accident, to order a return of part of the Apprentice Fee[i].

The mere circumstance of a *death* is not that species of Accident against which the Court relieves, (unless in the cases just adverted to;) but where the Plaintiff was prevented from recovering in Ejectment by a Rule of the Court of Law, and by an Injunction at the instance of the occupier, who ultimately failed both in Law and in Equity, an Account of Mesne Profits was decreed against the Executors of the Tenant[k].

A Bill will not lie to be relieved against the Condition of a Bottomry Bond, the same not having been performed in some small circumstances[l].

An Administrator being in possession of several houses, and much more than sufficient to pay debts and legacies, paid them as they were demanded, and afterwards, by the Fire of London, several of the Houses were destroyed, which constituted the greatest part of the Assets, and then, a Debt on a Bond being claimed, the Administrator was in Equity relieved[m].

Having noticed the leading principles of the

[i] Hale and Webb, 2 Bro. C. C. 78.

[k] Pulteney v. Warren, 6 Ves. 73.

[l] Anon. V. Abr. tit. Condition.

[m] Croft v. Lindsey and Colvil, 2 Freem. 1.

decisions in respect to Accident, we now proceed to consider the doctrines of Courts of Equity in respect of,

II. Mistake.

A Court of Equity will not supply a *Mistake* in a *Fine* after the death of the Conuzor[a], nor rectify a mistake of Names in a *Recovery*, especially after a length of time and against a Purchaser [b]. Nor will it relieve against an erroneous Recovery, in the Lords' Court [c].

But where a Deed is made on *good consideration*, (it is different where the Conveyance is *voluntary* [d], unless it be in favor of a *Wife*, or a legitimate *Child* [e],) Equity will supply a *defect* in the execution [f], the Court having equal Jurisdiction to relieve in respect of a plain mistake in contracts in Writing, as against frauds in Contracts: so

[a] Wharton v. Wharton, 2 Vern. 3. Whenever Vernon is quoted, it is from the last edition of that work, by Mr. Raithby, which is rendered so very valuable by his great industry, research, and accuracy.

[b] Bell against Cundall, Amb. 102.

[c] Ash v. Rogle, 1 Vern. 367.

[d] Pickering v. Keeling, 1 Ch. Rep. 78. Bonham v. Newcombe, 2 Ventr. 365. Lee v. Henley, 1 Vern. 37. contra, Watts v. Bullas, 1 P. Wms. 60; but that case disapproved in Goring v. Nash, 3 Atk. 188; and see *dictum* in Williamson v. Codrington, 1 Ves. 514.

[e] Vane v. Fletcher, 1 P. Wms. 354. Bonham and Newcombe, 2 Ventr. 365. Thomson v. Attfield, 1 Vern. 40. contra, Fothergill v. Fothergill, C. C. 70. In Cold v. Corbett, Prec. Ch. 8. the court seem to have thought it had a discretion as to relieving a mistake in a voluntary conveyance, sed qu. That the child must be legitimate to have relief, see 2 Ch. C. 266.

[f] Anon. 2 Freem. 256; but see the doubt expressed in Halton's case, 2 Leon. 2d part, p. 8.

that if reduced into Writing contrary to the intent of the Parties, on *proper proof*, that will be rectified[g]. By proper proof, is meant, "reasonable presumption," as some say[h], and as others have said, "strong irrefragable evidence[i]." And it is an essential ingredient to any relief under this head, that it should be on an Accident perfectly distinct from the sense of the Instrument[k].

If a Bargain and Sale be made, and it is not enrolled within six months, Equity will compel the Vendor to make a good title by executing another Bargain and Sale, which may be enrolled[l].

If a *defective Conveyance* be made, as a Mortgage in Fee by way of Feoffment, *without livery*, Equity will make good this defective Conveyance, and this, though, after such incomplete Feoffment, a Judgment is confessed to a third person, whose debt did not originally affect the Land[m]. And a defective Conveyance will not only be made good against the Party, but also as against his *Assignees*[n] or *Representatives*[o].

[g] Henkle v. Royal Exchange Assurance Company, 1 Ves. 317. Langley v. Browne, 2 Atk. 203.

[h] 2 Atk. 33.

[i] Shelburne v. Inchiquin, 1 Bro. C. C. 341. 344. Burt v. Barlow, 3 Bro. C. C. 454. and see Marq. Townshend v. Stangroom, 6 Ves. 335. 338. 9.

[k] Shelburne v. Inchiquin, 1 Bro. C. C. 350.

[l] Curtis and Perry, 6 Ves. 745.

[m] Burgh and Francis, Eq. Cas. Abr. 1 vol. p. 320. cited arg. 1 P. Wms. 279. S. C. under name of Burgh v. Burgh, Finch 28.; but see what Mr. Fonblanque observes on this case, Treatise of Equity, 1 vol. p. 34. in note.

[n] Finch v. Earl of Winchelsea, 1 P. Wms. 282. and see 1 Atk. 162.

[o] Cripps v. Jee, 4 Bro. C. C. 472. Morse v. Faulkener, 1 Anst. 14.

In like manner, where a Copyhold was mortgaged, but the Surrender not having been presented within the time limited by the Custom, was void, and the Mortgagor afterwards became a Bankrupt, such defective Surrender was, on a Bill filed against his Assignees, in effect made good; for the Assignees were directed to pay the Plaintiff his Principal, Interest and Costs, or to be foreclosed [p]. Cases proceeding on the same Principle are numerous [q]. But where certain formalities in Conveyances are required *by Act of Parliament*, and these are omitted, the Court, it seems, cannot remedy the omission: as, for instance, where the Instrument wants the necessary stamps [r]; or where a Bill of Sale of a Ship was made as a collateral Security, and the Papers, &c. were delivered, but there was no recital in the Bill of Sale, of the Registry, as is required by the 26th Geo. III. c. 60. Lord Thurlow held it could not be supplied in Equity [s], and thought he could no more reform the Title, where the Interest was derived under the party's own act and contract, not executed in the terms of the Statute, than he could reform an Annuity Deed, not according to the *Annuity* Act [t].

[p] Taylor and Wheeler, 2 Vern. 564. S. C. Salk. 449.

[q] See Dale and Smithwick, 2 Vern. 150.

[r] See what is said in Toulmin v. Price, 5 Ves. 240.

[s] Hibbert against Rolleston, 3 Bro. Ch. Cas. p. 3. Speldt v. Lechmere, 13 Ves. 588.

[t] See what Lord Eldon says in Curtis and Perry, 6 Ves. p. 745. and Mesteir and Gillepsie, 11 Ves. 626.

Mistakes in Deeds, are sometimes remedied by the *construction* given to them; for it is a general Principle, that where a Man has expressed a clear and manifest intention to dispose of his Estate, *and he mistakes the mode* of so doing, yet, if the instrument can be considered as valid, in point of substance, so as to effectuate the intent of the party, its informality shall be overlooked, and the deed take effect, if by law it can[u]: as where a man makes a feoffment to his relation and his heirs, and he neglects to make livery of seisin, it is obvious that he meant his relation should take it by a common conveyance; but he cannot do so for want of that formality, and therefore it shall operate *as a covenant to stand seised*, and the estate passes by the Statute of Uses, and not by the Common Law, so as to support the intention of the party, *ut res magis valeat quam pereat*[x]; but it has been held, that if a Trust of Lands be limited to A. and his Heirs and Assigns, or to such as he or they shall appoint, and *cestui que trust* devises these Lands by a Will, attested but by two Witnesses, the Will is void; nor will it be allowed to operate as an *Appointment*[y].

Defects in the *Execution of Powers* are relieved against in Equity, and in Equity only[z], and upon the same Principles upon which relief is given in

[u] The leading case on this head is Crossing v. Scudamore, 1 Ventr. 137. Franklin v. Franklin, E. T. 7 Geo. II. 1733. MSS.

[x] Habergham against Vincent, 4 Bro. C. C. 382.

[y] Wagstaff v. Wagstaff, 2 P. Wms. 258.

[z] Gooday v. Butcher, 9 Ves.

the case of defective Surrenders of Copyholds [a], which will be more particularly noticed hereafter.

If a *Power* is executed for *a valuable consideration*, but defectively, a Court of Equity will supply the defect, and this against a Remainder Man or one not claiming under the Power [b]. It would be otherwise if the execution were *voluntary* [c].

Where a Power, therefore, was to be executed in Writing, in the presence of *three* Witnesses, and it was executed, *in consideration of Marriage*, in the presence of *two* Witnesses only, the defective execution was supplied [d].

So, where a Power was given to settle on a wife, lands not exceeding £400 a-year, and, on marriage, the party covenanted to settle £400 a year, *clear of taxes and reprizes*, and a settlement was afterwards made of lands, with covenants that if they should fall short of £400 a-year the party would make up the deficiency: it was held that the settlement was intended as an execution of the power, and the making it a clear £400 a-year was a mistake and relievable [e].

Generally, it is a Rule, that the *Non-Execution* of a Power cannot be supplied [f], though a *defective*

394. The contrary doctrine in Zouch v. Woolston, 2 Burr. 1136. has long been considered as untenable.

[a] Watts v. Bullas, 1 P. Wms. 60. Chapman v. Gibson, 2 Bro. C. C. 229.

[b] Cotter v. Layer, 2 P Wms. 623.

[c] Ib. 624.

[d] Wilkie v. Holmes, stated in 1 Sch. and Lefroy, p. 60. n. a. S. C. 1 Dick. 165. Wade agt. Paget, 1 Bro. C. C. 368.

[e] Ambl. 424.

[f] Tullit v. Tullit, 2 P. Wms. 490. Holmes v. Coghill, 7 Ves. 499. and 12 Ves. 206.

Execution may. A *non-execution*, is where nothing is done; a *defective* execution, is where the Power has not been executed according to the terms of the power, but where it has been intended to execute it, and that intention is sufficiently declared but the Act declaring the intention is not an execution of the Power in the form prescribed; and there, the defect is supplied in Equity[f]. As where, in the Execution of a Power, there was a mistake as to the time at which the Interest should commence, relief has been given[g].

But though the legal Effect of the *Non-Execution of a Power*, is, that the property would go to a third person; yet if the Court can see that the Power is *coupled with a Trust to the execution of which the party looked with confidence*, the Failure or Negligence of the Trustee, will not be permitted, in Equity, to disappoint those objects[h]. This seems now, an acknowledged Principle of Equity, though some of the earlier cases are not easily reconcileable with it, and, in particular, the case of the *Duke of Marlborough* v. *Lord Godolphin*[i].

A Court of Equity will supply *a defective Execution of a Power*, as well in the case of *younger Children*, and a provision for a *Wife*, as in favor of *Purchasers*, or *Creditors*[k]: and in the case of a

[f] Shannon v. Bradstreet, 1 Scho. and Lefroy, p. 62, 3.

[g] Probert v. Morgan, 1 Atk. 440.

[h] Bax v. Whitbread, 16 Ves. 26. and see Brown and Higgs, in its several stages, 4 Ves. 708. 5 Ves. 495. 8 Ves. 561. S. C. confirmed on appeal to House of Lords, in 1813; see also Harding v. Glyn, 1 Atk. 469.

[i] 2 Ves. Sen. 61.

[k] Hervey v. Hervey, 1 Atk.

Wife or a Child it has never entered into the view of the Court, whether the provision was voluntary or not[l]. In cases without number, upon jointuring Powers particularly, it has been determined that a Covenant is a sufficient declaration of an Intent to execute[m]; and it is the same, even where a Covenant is made before the power arises, as where a power is limited to be exercised by Tenant for Life *in possession*, and he covenants *when he comes* into possession he will execute: in all those cases Courts of Equity have relieved[n].

It has been thought difficult to account for the interference of Courts of Equity to supply defects, in favor of a child, in cases of *Powers;* since the attempt to execute a Power, by Will, is no more than an intimation that the party means to execute it; but if all the requisite ceremonies have not been complied with, it cannot be supposed that the intention continued until his death[o]. Where, under a Power of Appointment among children it is defectively executed by a Will, if the children

563. Tollett v. Tollett, 2 P. Wms. 490. Coventry v. Coventry, 2 P. Wms. 222, and S. C. in Str. 596. and very fully given at the end of Max. in Equity the last case, Sergison v. Sealey, 2 Atk. 415. Menzey against Walker, For. 77. Wilkie v. Holme, 1 Dick. 165. and see Shannon v. Bradstreet, 1 Scho. and Lefr. 60.

[l] 1 Atk. 567.

[m] Shannon v. Bradstreet, 1 Scho. and Lefr. 63.; and see the cases quoted by Mr. Fonbl. Treatise of Equity, p. 313. in note, such as Fothergill v. Fothergill, 2 Freem. 256. Clifford v. Burlington, 2 Vern. 379. Coventry v. Coventry, 2 P. Wms. 222. Sarth v. Backfry, Gilb. 166. Vernon v. Vernon, Ambl. 3.

[n] Shannon v. Bradstreet, 1 Sch. and Lefr. 63.

[o] Vid. Finch and Finch, 15 Ves. p. 51. and see what is said in Holmes v. Coghill, 7 Ves. 506. and 12 Ves. 212. etc.

have legacies under the Will they are put to their Election [p].

It is observable that according to the opinion of *Lord Mansfield*, Courts of Equity, in the treatment of Powers originally in their nature legal, follow the Law. "Powers," he observed, "by a Tenant in Tail, to make Leases under the Statute, if not executed in the requisite form, will not admit of relief in Equity. So, with respect to powers under the Civil List Act, powers under particular family entails, Equity can no more relieve from them, than it can from defects in a Common Recovery. There is nothing in these cases to bind the conscience of the Remainder Man[q]." In later cases, however, it has been holden that if a Lease under a Power be granted for a *valuable consideration*, a Court of Equity will relieve against a defect in the Lease, in a point of form[r].

Mistakes in the execution of Powers by Will have been endeavoured to be remedied by a peculiar construction of Wills by which Powers have been executed. Hence, the doctrine of *Cy-pres*, in regard to *excessive* executions of powers *by Will* affecting *Real Estates*. But this doctrine of *Cy-pres* does not apply to *personalty* [s]. If, under a power to appoint to Children, an appointment by Will to a Child for Life, with remainder to her Children, is

[p] Whistler v. Webster, 2 Ves. 367.

[q] Earl of Darlington v. Pulteney, Cowp. 267.

[r] Doe v. Willer, 7 T. R. 478.

and see Campbell v. Leach, Ambl. 740.

[s] Routledge v. Dorriel, 2 Ves. jun. 364.

not valid, and the excess (the remainder to the children) is void; but this remainder is not considered as unappointed and to go accordingly, but the Court will appoint it *Cy-pres*, as near the intention of the giver of the Power as possible, and consider the child as taking an Estate-tail[t]. This doctrine of *Cy-pres* has not, however, been much approved, and has gone, *Lord Kenyon* observes, "to the utmost verge of the Law[u];" and *Lord Eldon* has said, "it is not proper to go one step further[x]."

Where there is an excess in an Appointment under a Power executed by *Deed*, the doctrine of *Cy-pres* is not applicable, as in the case *of Wills*[y], but in such case the appointment under the power is void, so far as relates to the excess. In a case, therefore, where the Power was to appoint to Children, and an appointment was made to a Child for Life, and after his decease, to his Wife and Children, with a limitation over, if he should have no Wife or Children at his death, to an object of the Power; the appointment to the Child for Life was held to be clearly good, but the gift after his death to his Wife and Children[z], was considered as void, they not being objects within

[t] See Pitt v. Jackson, 2 Bro. C. C. 51. Griffith v. Harrison, 3 Bro. C. C. 410; and see on this subject Harg. and Butl. Co. Lit. 271[b]. n. 1.

[u] Brudenell v. Elwes, 1 East. 451.

[x] Brudenell v. Elwes, 7 Ves. 390.

[y] Brudenell v. Elwes, 7 Ves. 382.

[z] In Duke of Devonshire v. Cavendish, mentioned 2 T. R. 245. a power to appoint to children was construed to extend to grand-children; but that case has not been followed; see Crompe v. Barrow, 4 Ves. 684.

the meaning of the Power; but the limitation over to the object within the Power, was held to be good, and capable of taking effect, if the Son left no Wife or Children at his death [a].

So, if there be a power to lease for twenty-one years, and the person leases for forty years, this is void only for the surplus, and good within the limits of the Power [b].

Under this head of *Mistake*, Settlements of *Real* or of *Personal* Estate will be reformed, if the Settlement be not according to the intention of the *Articles* upon which it is founded [c].

If a *Settlement* executed subsequent to Marriage, purporting to be in execution of Articles entered into before Marriage, does not take the *effect*, though it follows the *words* of the Articles; the Court will, on the ground of mistake [d], rectify that error in the frame of the Settlement [e]: nor is length of time any bar to such relief [f].

In cases of *Articles* before Marriage, the Court says, such and such Words in Articles are taken to denote such an intent; and the Conveyance is according to the intent so manifested [g].

Articles before Marriage containing limitations, which according to the strict legal operation of the words would give the parents [h], or either of

[a] Crompe v. Barrow, 4 Ves. 681.

[b] Hervey v. Hervey, 1 Atk. 569. Campbell v. Leach, Ambl. 740. see also Parker v. Parker, Gilb. Eq. Rep. 168. decided on same principle.

[c] Randal v. Willis, 5 Ves. 262.

[d] Mitford's Pleadings, 117.

[e] Randal v. Willis, 5 Ves. 273.

[f] Honor v. Honor, 1 P. Wms. 123. S. C. 2 Vern. 658.

[g] Brudenell v. Elwes, 7 Ves. 390.

[h] Trevor v. Trevor, 1 Eq. Abr. 387. and S. C. 1 P. Wms.

them [i], such an Estate-tail as would enable the Father alone, during the coverture, or the Surviving Parent afterwards, to bar the issue of the Marriage under a legal Settlement, limiting the Estate in the same words, Equity will rectify it and order a strict Settlement; unless the Issue is otherwise provided for than by the Limitation to the Heirs, &c. in the Articles [k], by an equivalent in a Settlement made after Marriage [l], or from other limitations or provisions in other Lands, it appears that the Party knew and intended the distinction [m]; or where there has been a Purchaser for a valuable consideration without notice [n], or the Articles cannot be produced [o].

The general principle upon which Courts of Equity interpose to carry Marriage Articles into execution by way of strict Settlement, notwithstanding the Articles themselves are not penned in that manner, is, that Articles made in consideration of and previous to Marriage, are considered *as heads of Agreement*, or short notes to be afterwards drawn out at length according to the usual course of Set-

622 .S. C. on appeal, 2 Bro. P. C. 122. Cusack v. Cusack, 1 Bro. P. C. 470. Villiers v. Villiers, 2 Atk. 73.

[i] Streatfield v. Streatfield, Cas. Temp. Talb. 176. Jones v. Langhton, 1 Eq. Abr. 392. Nandick v. Wilkes, 1 Eq. Abr. 393. C. 5. Gilb. Rep. 114. Bask v. Dalway, 3 Atk. 531.

[k] Chambers v. Chambers, Fitzg. 127. S. C. 2 Eq. 35.

[l] Glanville v. Payne, 2 Atk. 40. S. C. Barn. 18.

[m] Chambers v. Chambers, Fitz. 127. 2 Eq. Abr. 35. C. 4. Howell v. Howell, 2 Ves. 358.

[n] Fearne on Contingent Remainders, 108. West and Erissey, 2 P. Wms. 349. Warwick v. Warwick and Kniveton, 3 Atk. 291. Pritchard against Quinchant, Ambl. 148. Cardwell v. Mackrill, Ambl. 515.

[o] Cardwell v. Mackrill, Ambl. 515.

tlements[p], and that a provision for the issue of the marriage is one of the great and immediate objects of this agreement, and consequently a principal intention of such agreement must be to secure such a Settlement as shall contain an effectual provision for that Issue: which end, it is clear, cannot be answered in any degree by a Settlement so framed as to leave it in the power of either parent alone to bar their Issue by Fine or Recovery. The Issue in these cases are considered as claiming a provision in the capacity of Purchasers for valuable consideration, under the purport and intention of the stipulated terms upon which that marriage was engaged, and which gave them birth[q].

The Court, however, will not interfere if both Articles and Settlement are made before Marriage[r], unless the Settlement in that case be expressed to be made *in pursuance of the Articles*[s]; for otherwise the Court will suppose that the Parties had altered their Intention with respect to the terms of the Marriage; which they may before the Marriage, though not afterwards: and that the Settlement was made in pursuance of

[p] Taggart v. Taggart, 1 Sch. and Lefr. 87. and see 2 Atk. 545. 5 Ves. 275.

[q] Fearne on Remainders, p. 111, 112. and see the terms of Lord Harcourt's decree in Papillon and Voice, 2 P. Wms. 474. in note 1.

[r] Legg v. Goldwise, For. 20.

[s] West v. Erissey, 2 P. Wms. 349. This is the first case in which the Court altered the Settlement, and made it conformable to the articles, and relieved on the head of mistake. See 3 Atk. 293. Portyn against Roberts, Ambl. 317. Roberts v. Kingsley, 1 Ves. 239.

such new agreement and not of the articles. But when it is said to be made in pursuance of the articles, all room for such a supposition is precluded[s]. But there is no case but where there are articles as well as a settlement, that the Court will construe words which create a legal Estate-tail to be carried into a strict settlement[t].

And where the limitation in the articles gives an Estate-tail to the wife alone, in an estate derived from the husband, the settlement must be accordingly; because in such case it is not in the power of either of the parents *alone*, to bar the issue, either during or after the coverture; for the husband takes no Estate-tail, and cannot therefore bar the issue of the marriage; and the wife cannot, during the Coverture, do it without his concurrence: and her Estate-tail being *ex provisione viri*, the Stat. Hen. VII. prevents her doing it afterwards. And it has been held that their power of doing it jointly is not unreasonable, or inconsistent with the probable view and intent of the settlement[u]. But this doctrine does not, it seems, apply to *copyhold* estates; for the stat. of Hen. VII. and the 32 Hen. 8. c. 28. do not extend to them[w].

Where, in *articles*, it is agreed to convey to the *issue* of the marriage, "*whether Sons or Daughters*,"

[s] See Fearne on Contingent Remainders, last edition, from page 90 to p. 107, where the whole subject is admirably discussed, and most of the cases are noticed.

[t] Warrick v. Warrick, 3 Atk. 294.

[u] Fearne on Remainders, 94. and see Highway against Banner, 1 Bro. C. C. 584. Brudenell v. Elwes, 7 Ves. 390. Honor v. Honor, 1 P. Wms. 123. Whately v. Kemp, 2 Ves. 358. Green v. Ekins, 2 Atk. 477. S. C. 3 P. Wms. 306.

[w] See Mr. Butler's Note to Fearne Contingent Remainders, 114. n. X. to last Edition.

they take, *as tenants in common*[x]; and if the Estate is only a fee simple, or probably if it is only a Freehold, the settlement, it seems, would be upon the children as Tenants in Common in Tail with cross remainders; and if it is a mere chattel Interest it would be limited to them absolutely as Tenants in Common, with a Limitation over in case any of them die under twenty-one and without Issue [y].

And though a limitation by articles, to the heirs male of the marriage, after an express estate for life to the father, shall be taken to mean a Remainder to the *first*, &c. son, it does not follow that such a limitation to the heirs male of the Body must be equivalent to a remainder limited to daughters [z], and entitle them to a provision in the rectified settlement.

An elder daughter, is, in the execution of articles, accounted a younger child; and a deed founded on articles would be rectified to that effect [a]; but there is no case where the Court has considered a younger child as an eldest, but between parent and children, or those who stand *in loco parentis* [b].

Where a term for raising portions was placed *after* an estate-tail, but should have been *before*, the Court has rectified the mistake [c]. So a

[x] Taggart v. Taggart, 1 Sch. and Lefr. 84.

[y] Ib. and see Ward and Bradley, 2 Vern. 23.

[z] Powell v. Price, 2 P. Wms. 539.; but see contra Burton v. Hastings, Gilb. Rep. 113. West and Erissey, 2 P. Wms. 349. Hart v. Middlehurst, 3 Atk. 371.

[a] See Heneage v. Hunlocke, 2 Atk. 457.

[b] Hall against Hewer, Ambl. 204.

[c] Uvedale v. Halfpenny, 2 P. Wms. 151. adopted in Heneage v. Hunlocke, 2 Atk. 45. and see 2 Ves. 334.

settlement has been reformed according to the intention as declared in the *recital*[d].

If a Testator has by his will expressed a clear, unequivocal, intention[e], to pass a Copyhold, or a limited Interest in a Copyhold[f], (a remote reversion only[g];) but has omitted to make a Surrender to the use of his will, the Court will supply the Surrender, if the devise of the Copyhold is in favour of Creditors[h], a Wife[i], Children[k], a Legatee[l], or a Charity[m]; but not where there are limitations to Strangers prior to the Charity[n], nor in favour of Grandchildren[o], or of illegitimate Children[p], or a Sister of the Testator[q]. The principle on which relief is administered, seems to be, that wherever a man having Power over an Estate, shews an intention to execute such Power, in discharge of natural or

[d] Payne v. Collier, 1 Ves. Jun. 171. Doran v. Ross, 1 Ves. Jun. 59. S. C. 3 Bro. C. C. 28.

[e] Kightley v. Kightley, 2 Ves. Jun. 332.

[f] See Marston against Gowan, 3 Bro. C. C. 170.

[g] Cook v. Arnham, 3 P. Wms. 287.

[h] Car v. Ellison, 3 Atk. 77. The doubt expressed in 2 Freem. 65. has been long overruled.

[i] In Roome v. Roome, 3 Atk. 182. it was doubted whether this equity extended to a wife; but in Hawkins and Leigh, 1 Atk. 387. it was held it did.

[k] Anon. 2 Freem. 115. and see 234. Hardham v. Roberts, 2 Vern. 132.

[l] Palmer v. Palmer, 2 Dick. 534.

[m] See Harris and Ingledew, 3 P. Wms. 98.

[n] Ambl. 573. Att. Gen. against Downing.

[o] As to grand-children, see Kettle and Townshend, 1 Salk. 187. S. C. reversed in House of Lords, Show. P. C. but this reversal disapproved. See Hills v. Downton, 5 Ves. 565. Watts v. Bullas, 1 P. Wms. 61. and note, and see Chapman against Gibson, 3 Bro. 231. but adhered to by Lord Eldon in Perry v. Whitehead, 6 Ves. 544. and see 2 Ves. 582. Elton v. Elton, 3 Atk. 508. Goodwin and Goodwin, 1 Ves. 228.

[p] Cricket v. Dolby, 3 Ves. 12.

[q] 1 Ves. 128.

moral obligations, the Court will operate upon the conscience of the Heir, to make him perfect that intention[r]. The idea of supplying a Surrender was, originally, a bold one; and seems to have arisen out of some of the very extraordinary decisions upon the *Statute of Charitable Uses*[s], 43 Eliz. c. 4.

At first, it seems, the Court supplied the defect in favour of *Creditors*, and then they extended the doctrine in favour of *younger Children*, upon the idea, that younger children unprovided for, must be considered as creditors[t].

With respect to *Creditors*, a defective Surrender is not supplied, except where it is absolutely necessary for the payment of debts, and they would, otherwise, be unpaid. If, therefore, *Freehold and Copyhold* Estates be charged by a will, with the payment of debts; so long as any Freehold Estate remains applicable to that purpose[u], a Surrender of the Copyhold will not be supplied, notwithstanding the express intention of the Testator to charge the Copyhold rateably with, or even in preference to, the Freehold. But this

[r] Chapman against Gibson, 3 Bro. 230. and see Hills v. Downton, 5 Ves. 564. Tollet and Tollet, 2 P. Wms. 489.

[s] See Duke's Charitable Uses, and what is said in Rumbold v. Rumbold, 3 Ves. 69. and the remarkable Decision there alluded to.

[t] So said Arg. in Whitcombe v. Whitcombe, Prec. Ch. 282. and see Hills v. Downton, 5 Ves. 563.

[u] Mallabar v. Mallabar, For. 78. Ithell v. Beane, 1 Ves. 215. Drake v. Robinson, 1 P. Wms. 443. Hellier v. Tarrant, in Addenda to 3d edition of Forrester, p. 287. etc. and the cases there mentioned; but see Bixby against Eley, 2 Bro. C. C. 325.

is to be understood of the legal estate only; for it must be remembered that an *equitable* Estate of Copyhold will pass by such devise without surrender [w]; for not having the legal Estate, the Testator could not surrender [x].

Though a Surrender of a Copyhold will not be supplied in favor of a Widow, or younger children, where there are Freehold and Copyhold lands, and general words are used in the will, and the Copyhold Estate is not expressly mentioned [y], it is otherwise in the case of *creditors;* and if the Copyhold is wanted for debts, the want of a Surrender will be supplied, if there be general words used in the devise, such as, "*messuages, lands, tenements, and hereditaments,*" though the Copyhold Estates are not expressly mentioned [z].

Surrenders will be supplied in case of a Deed or a Will [a] in favor of *younger children*, who are unprovided for, (unless by the will under which they claim the Copyhold [b],) where a provision has been made for the heir, either by the father or a stranger; it being unimportant, by *whom* or *how* he is

[w] Macnamara v. Jones, 1 Bro. C. C. 482. Gibson v. Lord Mountfort, 1 Ves. 489. Allen v. Poulton, 1 Ves. 121. and see Hawkins v. Leigh, 1 Atk. 388. Macey v. Shurmer, 1 Atk. 390. Car v. Ellison, 3 Atk. 75. King v. King, 3 P Wms. 358.

[x] Tuffnell v. Page, 2 Atk. 38. S. C. Barn. 6.

[y] See Bias v. Bias, 2 Ves. 164.

[z] Vid. Drake v. Robinson, 1 P. Wms. 442. and see also Haslewood v. Pope, 3 P. Wms. p. 322. Lindopp against Eborall, 3 Bro. C. C. 189. Kidney v. Coussmaker, 12 Ves. 157.

[a] Rogers v. Marshall, 17 Ves. 295.

[b] Cooke v. Arnham, For. 36. S. C. 3 P. Wms. 383. and also in MS. under title of Cooke v. Arnold, Garn v. Garn, 16 Ves. 268. Chapman v. Gibson, 3 Bro. C. C. 230.

provided for[c], whether by settlement, or in any other way[d]; and the Court will not enter into a consideration of the *quantum* of the provision[e]; but some provision, *it seems*, there must be[f], though doubts have been thrown out on this point[g]: and the provision, it has been determined, must exist at the time when the Bill is filed[h]: it being said to be a rule, that the Court will not supply the defect of a surrender in favor of a wife, or younger children, to the disinherison of an heir, unprovided for[i]. But this doctrine as to a provision for the heir, is not applied to any heir, but a child[k], or, perhaps, a *grand-child*[l]; to an heir in blood, but not *hæres factus*[m].

If the heir mortgage the Copyhold to one, without notice of the devise, and there have been *laches* in the devisee, the surrender will not be supplied, as against such mortgagee[n].

A surrender will in some cases be supplied in favour of an eldest son: as in a case of Gavel-

[c] Pike against White, 3 Bro. C. C. 288.

[d] Hawkins v. Leigh, 1 Atk. 380.; but see 3 Atk. 183.

[e] Cooke v. Arnham, 3 P. Wms. 283. S. C. MS. Burton v. Floyd, 6 Vin. 56. pl. 20.

[f] Ib. and see Chapman v. Gibson, 3 Bro. C. C. 229.

[g] See Hills v. Downton, 5 Ves. 557. Fielding v. Winwood, 16 Ves. 92. Tudor v. Anson, 2 Ves. 582.; but see Lord Alvanley's remarks on Hills and Downton, in Sugden on Powers, Appendix, No. 6. p. 550.

[h] Cooper v. Cooper, 2 Vern. 265. S. C. 2 Freem. 17. Prec. Ch. 32.

[i] Hawkins v. Leigh, 1 Atk. 388. Macey v. Sharmer, 1 Atk. 390. and see Briscoe v. Cartright, Gilb. Eq. Rep. 121. Hicken v. Hicken, Vin. Abr. tit. Copyhold, (M. A.) Ca. 20. p. 59.

[k] Chapman v. Gibson, 3 Bro. C. C. 230.

[l] Rogers v. Marshall. 17 Ves. 297.

[m] Smith v. Baker, 1 Atk. 386.

[n] Weeks v. Gore, Vin. Abr. tit. Copyhold, (M. A.) Cas. 24.

kind Copyhold, where the intent of the will appears to be, that the eldest son should have the copyhold, paying a legacy thereout to the younger son [o].

Where a Surrender is supplied for *creditors*, an account will also be directed of the *rents and profits* from the time the copyhold estates are held to pass ; for, from that time the customary heir is a mere trustee : and this, though the heir be an infant [p] ; but in the case of a *younger child* guilty of great laches in not asserting his claim, (as for fourteen years,) an Account was decreed only from the time of filing the bill [q]. The plaintiff, where a surrender is supplied, usually pays the costs [r].

In cases where there are joint bonds, the Court has in causes, as well as in bankruptcy, sometimes inferred from the nature of the condition and of the transaction, that it was made joint, by *mistake*, and has rectified it [s]; decreeing, in a cause, that a new bond shall be executed *joint and several;* and, in cases of bankruptcy, that proof shall be made accordingly : it being supposed in these cases, that the bond, though joi t only, was *intended* to be both joint and several [t]. Parole

[o] Bradley v. Bradley, 2 Vern. 163. and the cases mentioned in note to Watts and Bullas, 1 P. Wms. 60.

[p] Kidney v. Coussmaker, 12 Ves. 158.

[q] Cook v. Arnham, 3 P. Wms. 288. in note 1; and S. C. MS.

[r] Banks v. Denshaw, 3 Atk. 587. S. C. 1 Ves. 63.

[s] Simpson v. Vaughan, 2 Atk. 33.

[t] Underhill and Horwood, 10 Ves. 227,8.

evidence may be adduced to prove, that words taken down in writing were contrary to the concurrent intention of all parties; but, as before observed, it must be *strong irrefragable evidence* [u].

It has been holden that a Mistake of Parties as to the law, is not a ground for reforming a deed founded on such mistake. As where an Annuity was granted, but no power of redemption contained in the deed, it being mistakenly thought by the parties it would make the transaction usurious, relief was refused [v]. Whether ignorance of law will entitle a party to open an account, has been doubted [w].

So, if two persons are bound in a *joint* obligation, and the obligee release one of them, not supposing that he thereby discharged the other, as, in Law, he does; yet the rule, *ignorantia juris non excusat*, applies, and Equity will not interfere [x].

So, where a *Copyhold* was devised to *A.* for life, with remainder to his first and other sons in tail, remainder to *D.* in fee. *A.*'s wife being *privement enseint* of a son, he was advised to buy the reversion in fee from *D.*, and take a surrender to his own use, which would merge his estate for life, and destroy the contingent remainder, there being then no issue born. He accordingly bought the reversion of the remainder-man. This transaction

[u] Shelburne v. Inchiquin, 1 Bro. C. C. 341, 344.

[v] Lord Irnham against Child, 1 Bro. C. C. 92. and see Lord Portmore against Morris, 2 Bro. C. C. 290.

[w] Langstaff v. Fenwick, 10 Ves. 406.

[x] Harman v. Camm, 4 Vin. 387.

proceeded altogether on a mistake of the *law*; for the freehold and inheritance being in the lord, that protected the contingent remainder. *A.* brought his bill under these circumstances to be relieved, against the security given to the reversioner for the purchase of the reversion, he being under a mistake[x]; but "Per Cur. Pay principal, interest, and costs, or be dismissed with costs[y]."

There are, however, several cases in which a party has been relieved from the consequences of acts founded on Ignorance of Law[z]; and in one case[a] it was said that, the maxim "*ignorantia juris non excusat*," was in regard to the public, that ignorance cannot be pleaded in excuse of *crimes*, but does not hold in *civil* cases. Ignorance is not mistake[b], and Relief, it is very clear, cannot be given on a *supposition* merely that parties are ignorant of the legal effect of their acts. If, for instance, a tenant for life pays off an incumbrance, and takes a release of the debt which he paid off, it cannot be contended he meant to continue it as a subsisting debt; or if a tenant for life, by planting or otherwise, improves his estate, such improvements are not claimable, as distinct from the freehold.

Nor will Mistakes of Judgment be relieved

[x] Mildmay v. Hungerford, 2 Vern. 243.

[z] See Lansdowne v. Lansdowne, Mos. 364. Pusey v. Desbouvere, 3 P. Wms. 315. Pullen v. Ready, 2 Atk. 591. and what is said of that case in Stockley v. Stockley, 18 Ves. 30. Jones v. Morgan, 1 Bro. C. C. 219. Gee and Spencer, 2 Vern. 32.

[a] Lansdowne v. Lansdowne, Mos. 364.

[b] 5 Ves. 14.

against. If an Agreement or Composition of a cause be made, the Court will not, upon the question whether either party is in the right or wrong, overturn an agreement made by parties, with their eyes open and rightly informed[c].

And where deeds have been executed to establish the peace of a family[d]; or where there has been a purchaser for a valuable consideration[e], though parties may have acted under a mistaken apprehension of their rights, relief has been refused.

But in general, Agreements relating to real or personal estate, if founded on Mistake, will for that reason be set aside. As where a person entitled to a share in the distribution of the personal estate of an intestate, makes an agreement under the supposition that the distributive share is of such a value, and it turns out that the share is of greater value, a court of Equity will set aside an Agreement originating in such a mistake[f].

So, where *A.* purchased an estate of *B.*, which, in fact, was the estate of *A.*—*A.* was allowed, on the ground of mistake, to have the purchase-money refunded, though there was no fraud in *B.* who apprehended he had a right to the estate[g].

And in such cases, it seems, a Mistake may be

[c] Browne v. Pring, 1 Ves. 408.

[d] Frank v. Frank, 1 Ch. Cas. 84. Stapilton v. Stapilton, 1 Atk. 10.

[e] Warner v. Watkins, 2 Atk. 8.

[f] Cocking and Pratt, 1 Ves. Sen. 400.

[g] Bingham v. Bingham, 1 Ves. 126.

taken advantage of, even after considerable lapse of time, (seven years, for instance[h],) but not after a long acquiescence under the mistake, and neither party aware of it[i].

Another very hard case illustrates the principle:—A Mortgage Deed came into the hands of an executor, who receives the money secured by the mortgage, and pays it away to his testator's creditors. It afterwards appears that the mortgage had been satisfied in the testator's life-time. A bill was filed against the executor to be relieved for this overpayment, and relief was decreed, although the money had been paid away by the executor, and the executor was driven to sue the creditors whom he had, through mistake, paid[k].

But where both parties have been mistaken, and the fact about which they were mistaken was, from its nature, doubtful, at the time of the agreement, and equally unknown to both parties, a court of Equity has refused relief. As where there was a contract for a piece of ground, which was about to be inclosed, for £20, and it turned out to be worth £200, yet neither party knowing the value, although the contract was to be performed *in futuro,* a specific performance was decreed[l].

It has also been determined, that if *A.* knowing there to be a Mine in the estate of *B.* of which he knew *B.* was ignorant, should enter into a con-

[h] East v. Thornberry, 3 P. Wms. 125.

[i] Nicholls v. Leeson, 3 Atk. 573. Vaughan v. Thomas, 1 Bro. 556.

[k] Pooley and Ray, 1 P. Wms. 354.

[l] See the case cited by Lord Chancellor in Mortimer and Gapper, 1 Bro. C. C. 158.

tract to purchase the estate of *B.* for the price of the estate, without considering the mine, the court, it seems, will not set it aside[m]. It is essentially necessary in order to set aside such a transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery[n]; which brings it to a case of *fraud.*

If instruments be delivered up by mistake, and owing to ignorance of a transaction which would have made it conscientious to hold the instrument, and proceed at Law, a court of Equity will relieve[o].

Equity will not relieve against mispleading[p], or the inattention of parties in a court of Law, as neglecting a proper defence[q], or to move for a new trial[r] in proper time; but if a plaintiff, at Law, recovers a debt against the defendant, and the defendant afterwards finds a receipt under the plaintiff's hand, or that the plaintiff's own book appears to be crossed, Equity will relieve[s]; and this seems reasonable, inasmuch as the courts of Law would not, in such case, grant a new trial[t].

And, where in an action against a bankrupt, he, for want of his commission, was unable to sup-

[m] Fox v. Mackreath, 2 Bro. C. C. 420.

[n] Ib.

[o] East India Company v. Donald, 9 Ves. 275.

[p] Stephenson v. Wilson, 2 Vern. 325. Blackhall v. Combs, 2 P. Wms. 72.

[q] Ware v. Horwood, 14 Ves.

[r] Bateman v. Willoe, 1 Sch. and Lefr. 201.

[s] Countess of Gainsborough v. Clifford, 2 P. Wms. 426.; but see Barbone v. Trent, 1 Vern. 176.

[t] See Marriott v. Hampton, 7 T. R. 269.

port his plea of a certificate, he was relieved, and a perpetual injunction granted [u].

So, where a defendant failed at law for want of proving a copy of a judgment, a perpetual injunction was granted, the matter being such as was examinable in Equity, as well as at Law [v].

In regard to *Mistake by Arbitrators*, it has been holden that, if an Arbitrator in his award make a plain mistake, either in the Law, or in the Fact [w], a bill in Equity may be filed against the party in whose favor the award is made [x], to set aside the award; but if a question of *Law* be expressly referred to an arbitrator, there, though the arbitrator is wrong in his conception of the law, the award cannot be remedied [y]: and though the law be not referred, if it be a doubtful point of law upon which the arbitrators have decided, and the Court on great deliberation should be of a different opinion, the award will yet be good [z].

It has been doubted whether after a general reference to arbitration, by parties in a suit, depending in the Court of Chancery, and made an order of a Court of Law, such order, by virtue of the statute [a], excludes the equitable jurisdic-

[u] Blackhall v. Combs, 2 P. Wms. 69.

[v] Kent and Bridgman, 2 Eq. Abr. 159. S. C. Prec. Ch. 233.

[w] Ridout v. Payne, 3 Atk. 494. and S. C. 1 Ves. 11, 12. Corneforth v. Geer, 2 Vern. 705. Metcalf and Ives, 1 Atk. 63: but see Ching v. Ching, 6 Ves. 282. Young and Walter, 9 Ves. 364.

[x] Anon. 3 Atk. 644.

[y] Young and Walter, 9 Ves. 364. S.P. —— v. Morgan, MS. and see 14 Ves. 271. in note; see also Ching v. Ching, 6 Ves. 282.

[z] 2 Atk. 494.

[a] 9 and 10 Wm. 3. c. 15.

tion over awards, in cases of Mistake[b]. If one condition of the submission is to be restrained from bringing a bill in Equity against the arbitrator, a plea of the award, it seems, would be allowed[c].

With respect to *Mistakes in settled Accounts* they are elsewhere considered[d]; but it may here be observed that if an account be settled, and a deed cancelled under a *mistake*, relief may be obtained[e].

Mistakes in Wills, are frequently relieved against in Equity.

As where there was a mistake in a statement in the Will, and the mistake was clear, and the intention plain, the Court rectified the mistake according to the intention[f]. But in all these cases, the mistake must appear *on the face of the Will*, otherwise, no relief will be given. Evidence as to matter *dehors* the will, to shew the mistake, is not sufficient[g]. The mistake must be a clear, demonstrable mistake; and wherever there is a clear mistake or a clear omission, recourse is to be had to the general scope of the will, and the general intention to be collected from it; but the first thing to be proved is, that there is a mistake[h].

[b] Nichols and Chalie, 14 Ves. 265; but see Browne and Browne, 1 Vern. 158.

[c] See Lingood v. Croucher, 2 Atk. 396, 7; but see ib. p. 506.

[d] See tit. Account, post.

[e] East India Company v. Neave, 5 Ves. 173.

[f] Williams against Williams, 2 Bro. C. C. 87. Milner and Milner, 1 Ves. 106; see also Phillips and Chamberlain, 4 Ves. 51.

[g] 2 Atk. 373.

[h] See Ridout v. Dowding, 1 Atk. 419. Mellish and Mellish, 4 Ves. 47.

Where a Testator by his Will gave legacies to *A.* and *B.* describing them, as grand-children of *C.* and their residence in *America*, and by a codicil he revoked these legacies, giving as a reason that the legatees were dead; but that, *not being true*, it was held that the will was not revoked, and that they were entitled to the Legacies, upon proof of identity [h].

So, where the residue of three per cent. Annuities was given to the two daughters of *A.*, and *A.* had three daughters: they all, on the ground of mistake, were decreed to take equal shares [i].

And, where a specific sum was given as a residue and *miscalculated*, the real residue was allowed to pass [k].

So where a testator gave a sum, *part of his four per cent. Bank Annuities*, to his wife for life, and after her decease to several relations; evidence was admitted to shew that the testator had no such stock at the date of the will, having previously sold it all, and invested the produce in *Long Annuities*, and how the mistake arose; and upon such evidence the legacies were established [l].

If the testator had had the stock at the time, the legacy would have been considered as *specific*, and that he meant that identical stock; and any act of his destroying that subject would be a proof of *animus revocandi;* but if it is a *denomina-*

[h] Campbell v. French, 3 Ves. 321.

[i] Stebbing v. Walkey, 2 Bro. C. C. 85, and the cases mentioned in the argument of Mr. Scott.

[k] Danvers against Manning, 2 Bro. C. C. 18.

[l] Selwood v. Mildmay, 3 Ves. 306. See a similar case, Door v. Geary, 1 Ves. 255.

tion, not the identical *corpus*, in that case, if the thing itself cannot be found, and there is a mistake as to the subject out of which it is to arise, that will be rectified[m].

If a *Ring* or a *Picture* be given, and neither can be found, the mistake cannot be rectified[n].

A *Mistake* in the *name* of a Legatee, may be corrected in favor of the legatee by articles of description, sufficiently pointing out the person intended to take[o], and this, though both the Christian and Sirname be mistaken[p]. So, in the case of a legacy, parol evidence is admissible to explain a nick-name, or where there are two persons of the same name[q], but not to fill up a *blank* in a will[r]. In cases where evidence is admitted and operates, it must be conclusive, to have effect : if it affords only a high degree of probability[s], it is insufficient.

Where the words used in the gift of a legacy are plain, evidence as to the intention, and to shew there was a mistake as to the fund, is inadmissible[t]. Some such evidence was reluctantly admitted in one case[u]; but there, it seems, the peculiarity of the will furnished sufficient

[m] Selwood v. Mildmay, 3 Ves. 310.

[n] Ib. 310.

[o] Rivers case, 1 Atk. 410. see Parsons v. Parsons, 1 Ves. Jun. 266. S. C. noticed arg. 3 Bro. C. C. 447.

[p] Beaumont v. Fell, 2 P. Wms. 140. Goodinge v. Goodinge, 1 Ves. Sen. 231, 61. Dowsett v. Sweet, Ambl. 175.

[q] See 5 Co. 68.

[r] Baylis v. Attorney Gen. 2 Atk. 239.

[s] See Holmes v. Custance, 12 Ves. 279. Del Mare against Rebello, 3 Bro. C. C. 446, and S. C. 1 Ves. Jun. 412.

[t] Chambers v. Minchin, 4 Ves. 676.

[u] Fonnerau v. Poyntz, 1 Bro. C. C. 472.

doubt to warrant the admission of collateral evidence to explain it [v].

Where a Will is cancelled by mistake, or on a presumption that a latter will is good, which proves void, this will not let in the heir, but is relievable in Equity [w].

2. *Account.*

The Jurisdiction of Courts of Equity in matters of Account has been sometimes supposed to have arisen on the ground, that the accounting party was considered in the light of a trustee [x]. It seems, however, that the principle upon which courts of Equity originally entertained suits for an account where the party had a legal title, was, that though he might support a suit at Law, a court of Law could not give *so complete a remedy* as a court of Equity; and, by degrees, courts of Equity assumed a concurrent jurisdiction in cases of Account. The same species of Relief is given at Law in the action of Account, as under a bill in Equity; but the great advantage of the latter, and the difficulty and delay where the account comes before *auditors*, has brought that action into disuse [y].

[v] 1 Bro. C. C. 480.

[w] Onions v. Tyrer, 1 P. Wms. 345, 6.

[x] See 4 Vin. Abr. 533. and what Lord Erskine says, 13 Ves. 268. but see 1 Ves. Jun. 420.

[y] The Corporation of Carlisle v. Wilson, 13 Ves. 278, 279. and see 11 Ves. 155. O'Connor v. Spaight, 1 Sch. & Lefr. 309. and 2 Ves. 388. 1 vol. Selwyn's Abridgement, p. 1. Mitford's Pleadings, p. 110. The most recent case of an action of account, is reported in 3 Wills. 73.

If the right at Law be doubtful, an issue is directed, and if the right be established, the account follows [z]; and, in general, where the party cannot recover at Law, a bill for an Account is not sustainable. [a]

Dealings between a *tradesman and customer*, may be the subject of *Account* in Equity, especially in the case of securities obtained from an extravagant young man on misrepresentation [b].

It is not, however, every case where the defendant owes more to the plaintiff, that forms a ground for a bill for an Account. There must be *mutual demands*, forming the ground [c]; a series of accounts on one hand, and a series of payments on the other, and not merely one payment and one receipt [d]; and if the subject is matter of *set-off* at Law, and capable of proof, a bill will not lie [e]. The case of *Dower* is always considered as standing upon its own specialities; and so is the case of a *Steward* [f].

Where there have been various dealings between *Landlord and Tenant*, so as to produce an account too complicated to be taken at Law, and the landlord brings an ejectment for non-payment of rent, the tenant may file a bill, before judgment at law, for an account, on the footing of those dealings, and to have the balance applied to the rent claim-

[z] Vid. Milbourn and Fisher, 5 Ves. 685. in Note.

[a] 13 Ves. 278.

[b] Lord Courtney v. Godschall, 9 Ves. 473. S. C. MS.

[c] Dinwiddie v. Bailey, 6 Ves. 136.

[d] Wellings and Cooper in Exchequer, cited by Romilly, MS. and see 9 Ves. 473.

[e] Dinwiddie v. Bailey, 6 Ves, 136.

[f] 6 Vez. 136.

ed to be due, and the tenant need not bring in the rent under the statute, 4 Geo. 1. c. 5. [g]

The court gives an account in the case *Mines* [h], because it is in the nature of a *Trade* [i]; and in the case of *Timber* cut down [k], to prevent a multiplicity of suits [l]; though as to this, if there is not a ground for an Injunction to restrain Waste, as where more timber is threatened to be cut, the party must go to Law [m]. Lord Thurlow, indeed, appears to have thought that, where a Tenant for life, punishable for waste, fells timber, a Bill for an account by a Remainder-man in fee, lies against him, on the ground, that the Tenant for life has made himself Bailiff to the plaintiff [n]; though that does not seem very consistent with the doctrine in the same case, viz. that the remainder-man must take the money *the timber produced*, and not the *real value* of the timber, which even a court of Law would have given him [o].

A *factor* (unless he be an infant [p],) is compellable to account in Equity, and likewise for a deceased Co-Factor [q]; and the representatives of a Factor are accountable [r].

A *conuzor* has a right to file a bill for an Account against a conuzee, to see if the conuzee upon

[g] 1 Sch. and Lefr. 305. etc.
[h] Bishop of Winchester v. Knight, 1 P. Wms. 406.
[i] Story v. Lord Windsor, 2 Atk. 630.
[k] 1 P. Wms. 406.
[l] Pulteney v. Warren, 6 Ves. 89.
[m] 1 P.Wms. 406. Jesus Coll. v. Bloom, 3 Atk. 262.
[n] Lee v. Alston, 1 Ves. Jun. 82. S. C. 1 Bro. C. C. 196.
[o] Lee against Alston, 3 Bro. C. C. 38.
[p] Smalley v. Smalley, 1 Eq. Abr. 6.
[q] Holtscomb v. Rivers, 1 Ch. Cas. 127. S. C. 1 Eq. Abr. 5.
[r] Nels. 125. S. C. 1 Eq. Abr. 6.

the extended value under an *elegit* has received a satisfaction for his whole debt[s]; but in these cases, it has been said, the Tenant by *elegit* is never made to pay *costs*[t].

An heir cannot, *merely as heir*, file a Bill for an Account, *unless he states an impediment to his recovering at Law:* as that, the defendant has the *title deeds* necessary to maintain his title, or that *terms* are in the way of his recovery at law; or some other legal impediments, which do, or may probably, prevent it: upon which probability, or upon the fact, the Court founds its jurisdiction[u]. Bills of this description are what are termed *Ejectment Bills*, and as in these cases, where the validity of a will comes in question, it cannot be determined by a court of Equity, it sends that to be determined by the proper tribunal, by *directing the heir to bring an Ejectment*, providing, at the same time, that the defendant shall not set up at Law a term satisfied or unsatisfied[v]; and those obstacles being removed, and a trial had in that way under the control of a Court of Law, they come back for the *account*, the *deeds*, &c. which course leaves all the incumbrances just as much incumbrances as if the possession had not been changed. There is great convenience in giving relief in that shape rather

[s] Yates v. Hambly, 2 Atk. 362.

[t] Owen against Griffith, Ambl. 520.

[u] Pulteney v. Warren, 6 Ves. 89. and see Dormer v. Fortescue, 2 Atk. 284.

[v] See Leighton v. Leighton, 1 P. Wms. 671.

than by directing *issues*[w]; for the question whether a new trial should or should not be had, is discussed with much more satisfaction, where the trial was had, than in the court out of which the issue was directed. In bills, however, of this description, there must, it seems, be some *averment* upon the Record, as well as *proof* that those obstacles do exist, which may prevent an ejectment; the admission of such obstacles, by infants, is insufficient[x].

With respect to the *Account* ordered *of Rents and Profits* of Estates, in these and similar cases, the rule appears to be, that where a man brings his bill in Equity, in respect of a *trust*, and upon a mere equitable title, he will in Equity recover the Estate; but as upon a legal title at Law no more than six years mesne profits are recoverable, so where an Estate in trust, is recovered in Equity, the account of rents and profits is not extended beyond six years[y]; and under special circumstances, the Court will only decree an Account of Rents and Profits from the time of bringing the bill. As where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared; or where the title of the plaintiff appeared by deeds in a stranger's custody. So, where there hath been any default or laches in the plaintiff

[w] As was done in Pemberton and Pemberton, 13 Ves. 290.

[x] Pemberton v. Pemberton, 13 Ves. 298.

[y] See Reade v. Reade, 5 Ves. 749, 750. Stackhouse v. Barnston, 10 Ves. 469; but see what is said in Dormer v. Fortescue, 3 Atk. 130.

in not asserting his title sooner[z], and he has lain by, the Court has often thought fit to restrain it to the filing of the bill. In the instance of a bill brought by an infant to have possession of an estate, and an Account of Rents and Profits, the Court will decree an account *from the time of the infant's title accrued;* for every person who enters on the estate of an infant, is considered as entering as guardian or bailiff for the infant[a]: and so says *Littleton*. Where, indeed, there is a verdict against the infant's title he can have no Account till he has recovered at Law, and the bill will be retained, and a trial in Ejectment directed[b]. There are other cases where the Court will, merely upon a legal title, give the account from the filing of the Bill, as wherever the plaintiff has been kept out of the Estate by the *fraud*, *misrepresentation*, or *concealment* of the defendant[c].

If there is no trust, nor infant[d] in the case, nor any entry made by him, who is entitled to the mesne profits, Equity will not decree an account of rents and profits until a recovery has been had[e]. But where a discovery is necessary of the deed under which the plaintiff's title arises, and relief is prayed to have it produced at all trials at

[z] See Lockey v. Lockey, Prec. Ch. 518.

[a] Dormer v. Fortescue, 3 Atk. 130; see Yallop and Holworthy, 1 Eq. Abr. 7. Newburgh v. Bickerstaffe, 1 Vern. 296. and see Pettiward v. Prescott, 7 Ves. 541.

[b] Newburgh v. Bickerstaffe, 1 Vern. 295.

[c] 3 Atk. 130. and Bennett v. Whitehead, 2 P. Wms. 645. where the deeds and writings making the plaintiff's title were concealed by defendant, Townshend v. Ash, 3 Atk. 340.

[d] Roberdan v. Rous, 1 Atk. 544.

[e] Norton v. Frecker, 1 Atk. 525.

Law, and to have attested copies, an account of profits will be decreed, without having the title first established at Law, if there is no doubt as to the title[f].

In all cases where questions have arisen about *Shares in Water-works*, the parties have constantly resorted to Equity for mesne profits, though it is a legal Estate, and a corporeal Inheritance[g].

Where a person has been ejected at Law, and the other party has been *in possession above twenty years*, and no account demanded, or bill filed in that time, the *Statute of Limitations*[h] will bar an account in Equity, as well as an action for the mesne profits at Law; but this statute does not extend to a trust[i].

Under the head of Account, it is, that *Partnership Dealings* form a subject for equitable interference; nor will a Court of Law direct a Partnership Account to be taken[a]. But the Partnership must not be illegal, as in *Underwriting*, for in such case, a bill for an Account will not lie[b].

It has been holden that a Court of Equity has Jurisdiction against a *Corporation* on a bill for an Account of Profits, in the nature of a Partnership; and this, not only at the instance of a member, but of a stranger[c].

[f] Townshend v. Ash, 3 Atk. 337.

[g] 3 Atk. 337.

[h] 21 Jac. 1.

[i] Nevarre and Rutton, Vin. Abr. Tit. Account, (D. A.) pl. 7.

[a] See Chapman and Koops, 3 Bos. and Pul. 289. and Watson's Partnership 107. see also King v. Whitstaple Comp. 7 East. 353. what Lawrence, Just. says.

[b] Knowles v. Haughton, 11 Ves. 168. S. C. MSS.

[c] See 17 Ves. 315.

Partners are joint-tenants in the stock and all effects, and not only in that particular stock in being at the time of entering into the Partnership; but they continue so throughout, whatever changes may be made in the course of trade[c].

If a person becomes by his acts a Partner, in a Colliery, for instance, in which land is necessary to carry on a trade, the interest in a *lease* will pass as an incident to the trade, by operation of Law, and is not affected by the *Statute of Frauds*[d]. Being thus seized *per my et per tout*, where an Account is to be taken, each is entitled to be allowed against the other every thing he has advanced or brought in as a partnership transaction, and to charge the other in that Account with what he has not brought in, or has taken out more than he ought: and nothing is to be considered as his share, but his proportion of the residue in the balance of the Account[e].

A Judgment and Execution against one partner for his separate debt, does not put the other in a worse condition; for he must have all the allowances made him before the Judgment Creditor can have the share of the other applied to him.

So, if one partner dies, the debts and effects survive; but the survivor, unless it is expressly provided otherwise[f], is considered in Equity, (except as to the *good will* of the trade, which survives, and is not partnership stock[g],) barely as a trustee for the re-

[c] 1 Ves. 242, 3. and see Lyster v. Dolland, 1 Ves. Jun. 435.
[d] Forster v. Hale, 3 Ves. 696, 5 Ves. 308.
[e] West v. Skip, 1 Ves. 242, 3.
[f] Peace v. Chamberlaine, 1 Ves. 33.
[g] Hammond v. Douglas,

presentatives of the deceased, upon which footing the Account would be taken, and nothing considered as the share of the survivor till afterward [h]; which is from the continuance of the property in the stock to the representative of the deceased partner, who has a specific lien thereon, although the survivor afterwards dies or becomes bankrupt. So, if the partnership is dissolved by consent, or by effluxion of time [i], that determines not the legal interest, which continues as before; so that the property in the stock of the partner so going out is not divested thereby; but he remains equally entitled as Joint-tenant with the other: and in a bill for an Account, the stock would be subjected for his satisfaction. As between one partner, and the separate creditors of the other, the separate creditors cannot affect the stock any farther than that partner could whose creditors they are [k]; and if they proceed against the partnership property, the partners may file a bill to be quieted in the possession of the partnership effects, and pray for an Account of what is due to the partner so giving a security, and for an injunction in the mean time [l].

Where there has been a fair dissolution of partnership between two; and one by agreement retains the partnership effects, and afterwards

5 Ves. 539. Sed Vid. Crashaw v. Collins, 15 Ves. 227.

[h] 1 Ves. 243. and see as to this, Croft v. Pyke, 3 P. Wms. 182. and —— Exparte Williams, 11 Ves. 5. and Exparte Ruffin, 6 Ves. 126, 7.

[i] 1 Ves. 243. and see Exparte Smith, 5 Ves. 297.

[k] West and Skip, 1 Ves. 243. and see Young v. Keighley, 15 Ves. 557.

[l] Taylor v. Fields, 15 Ves. in note.

becomes a bankrupt, the joint creditors have no right as against what was joint property, remaining *in specie*[m]; for by the agreement the *joint* became *separate* Estate.

A partnership, without any agreement for continuance, may be dissolved at any time when either party thinks proper, subject to the proper Accounts[n]; but all the subsisting engagements must be wound up: and for that purpose they remain with a joint interest; but they cannot enter into new engagements. If after such dissolution, the trade be carried on by any of the partners, such partners are liable to account for the profits produced by such trading[o].

Where a partnership is so dissolved, a bill may be filed for an Account, and to restrain the defendant from using the partnership name, and receiving the partnership debts[p].

If, on a bill filed for an Account of partnership transactions, the defendant denies that he is a partner, he may refuse to set forth an Account[q]; but the Court, in such case, directs an issue, as to whether a partnership exists or not; and if the result of the issue is that he is not a partner, the bill is then dismissed[r].

The Statute of Limitations is no plea in bar to

[m] Exparte Ruffin, 6 Ves. 119. Exparte Williams, 11 Ves. 3. and see Exparte Fell, 10 Ves. 347.

[n] Peacock v. Peacock, 16 Ves. 56, 57.

[o] Featherstonhaugh v. Fenwick, 17 Ves. 310. and see Crashaw v. Collins, 15 Ves. 218.

[p] Master v. Kirton, 3 Ves. 75.

[q] Marquis of Donegal v. Stewart, 3 Ves. 446.

[r] See Peacock v. Peacock, 15 Ves. 52. and see Binford v. Dommutt, 4 Ves. 756.

an open Account [s]; but though length of time forms no bar to an account, as *between merchant and merchant*, yet if dealings between them have *ceased for several years*, and one of them dies, and the surviving merchant brings a bill for an Account, the Court will not decree an Account, but leave the plaintiff to his remedy at Law [t].

Length of time cannot be set up as matter of law, by *demurrer*, as a *compleat bar* to an *equitable demand*; for length of time operates as a bar, not *proprio jure*, but as a fact shewing acquiescence: and a party cannot avail himself of an inference from facts on a demurrer [u]; but *length of time* may be urged with great effect at the *hearing* of the cause; for it is a rule founded on principles of *public policy* [w], that parties shall not, by neglecting to bring forward their demands, put others to a state of inconvenience subjecting them to insuperable difficulties: every presumption, therefore, that can fairly be made, will be made, against a stale demand. Indeed, the very forbearance to make a demand is considered as affording a presumption either that the claimant is conscious it was satisfied, or intended to relinquish it [x]. "A Court of Equity," says *Lord Camden*,

[s] Scudamore v. White, 1 Vern. 456.

[t] Sherman v. Sherman, 2 Vern. 276. and see Bridges v. Mitchell, Gilb. Eq. Rep. 225.

[u] Doleraine against Browne, 3 Bro. C. C. 633.

[w] See Hercy against Dinwoody, 4 Bro. 268.

[x] Pickering v. Lord Stamford, 2 Ves. jun. 280, 582, 3. and see Doleraine v. Browne, 3 Bro. Ch. C. p. 633. and Whapham v. Wingfield, 4 Ves. and Higgins v. Crawford, 2 Ves. jun. 572. Brownell v. Brownell, 2 Bro. C. C. 63. and see Sturt v. Mellish, 2 Atk. 610.

"which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this Court into activity, but *conscience*, *good faith* and *reasonable diligence:* where these are wanting, the Court is passive and does nothing. Laches and neglect are always discouraged; and therefore from the beginning of this jurisdiction there was always a limitation to suits in this Court[y]."

Where, therefore, a party has lain by for a great length of time, and suffered an Estate to be distributed, he cannot insist on an Account [z]; but on the other hand there are cases when, where parties are not called upon to refund what has been applied, and the Accounts are clear, relief has been given, notwithstanding great length of time has elapsed [a].

A *release*, if under seal, may be pleaded in bar to a Bill for an Account [b]; and so may a *stated Account* in writing [c], or it may be insisted on in an *answer* [d]. If the Bill not only impeaches an Account, but charges, the plaintiff has no counterpart

[y] Smith v. Clay, Ambl. 645. but see judgment more fully reported, 3 Bro. C. C. 639. in note; and see Lacon v. Briggs, 3 Atk. 105.

[z] Hercy against Dinwoody, 4 Bro. 257. and see Smith v. Clay, 3 Bro. C. C. p. 539. in n. S. C. Ambl. 645. but not so full. See also Doleraine v. Browne, 3 Bro. C. C. 646.

[a] As in Pickering v. Lord Stamford, 2 Ves. 581. see Astrey's case, 2 Freem. 55.

[b] Mitford Pleadings, 209, 210.

[c] Ib. 208. 2 Atk. 399. 3 Bro. C. C. 170.

[d] Sumner v. Thorpe, 2 Atk. 1.

and the defendant pleads a stated Account, he must annex it to his Answer[e]. If error or fraud are charged, they must be denied by the plea as well as by way of answer; and if neither error or fraud is charged, the defendant must by his plea aver that the stated Account is just and true, to the best of his knowledge and belief[f].

A stated Account, to be good and pleadable as such, need not be *signed* by the party; for it is not the signing, but the person to whom the Account is sent, keeping it by him any length of time without making any objection, which binds him, and prevents his entering into an open Account afterwards[g]. It is said, that among merchants, it is looked upon as an allowance of an Account current, if the merchant who receives it does not object against it in a second or a third post[h].

And with respect to *Foreign Merchants*, if one Merchant sends an Account current to another in a different Country, on which a balance is made due to himself, and the other keeps it by him two years without objection, the rule in Equity and of Merchants, is, that it is considered as a *stated* Account[i].

Where a *Fraud* appears in a *stated* Account, the whole will be opened though of a great many years standing[k]. And though an Account be settled by Arbitrators, it is not conclusive, if any

[e] Hankey v. Simpson, 3 Atk. 303.
[f] Mitford's Pleadings, p. 208.
[g] Willis v. Jernegan, 2 Atk. 252.
[h] 2 Vern. 276.
[i] Denton v. Shellard, 2 Ves. 239.
[k] Vernon v. Vawdrey, 2 Atk. 119.

error can be shewn in the Account [l]. But if a Bill be filed to impeach a settled Account, specific Errors must be shewn [m], except, perhaps, in the case of an Attorney, where upon the face of the Account, the Attorney admits that he has not given credit, and produced that state of his affairs, that the Client was entitled to have [n]; but where the Accounts are not sought to be set aside for fraud, but, letting them stand, it is sought to surcharge and falsify them, it is a fixed Rule that some error must be charged, and this though the Account contain the usual words "Errors excepted [o]:" for it is impossible for the Defendant to defend himself, if under a general charge, not specifying any error, the Plaintiff may come at the hearing with the proof of those errors, of which the Defendant has heard nothing [p]. There must be error enough upon the Bill to shew there is reason for it; the Plaintiff proves some of those Errors and gets a Decree [q].

Where a Bill was filed for an Account, and a settled Account was suggested by the Answer, but not proved, Liberty was given in the Decree to surcharge and falsify, if the Master should find any settled Account [r]. When Parties are thus at

[l] Tottenson v. Peat, 3 Atk. 530.

[m] Anon. 2 Freem. 62. Chambers v. Goldwin, 5 Ves. 837. Dawson and Dawson, 1 Atk. 1. and see Drew v. Power, 1 Sch. and Lef. 192.

[n] Matthews v. Wallwyn, 4 Ves. 125.

[o] 3 Bro. C. C. 266. yet see Proud v. Combs, 2 Freem. 183.

[p] Chambers v. Goldwin, 9 Ves. 266. Taylor v. Haylin, 2 Bro. C. C. 310; and see Bourke and Bridgman, 2 Barn. 272. Johnson against Curtis, 3 Bro. C. C. 266.

[q] Twogood v. Swanston, 6 Ves. 486.

[r] Kinsman v. Barker, 14 Ves. 579.

Liberty to *surcharge and falsify*, they are not confined to mere *errors of fact*, but may take advantage of *errors in Law*[s].

Where Liberty is given to surcharge and falsify, the *onus probandi* is always on the party having that Liberty; for the Court takes it as a stated Account and establishes it; but if any of the Parties can shew an omission, for which credit ought to be, that is a surcharge; or if any thing is inserted that is a wrong charge, he is at liberty to shew it, and that is falsification; but that must be on proof on his side: and that makes a great difference between the general cases of an open Account, and where only leave is given to surcharge and falsify, for such must be made out[t].

It has been laid down as a Rule, to be departed from only on very special circumstances, that a Man standing in the Relations of Agent, Auditor, Land Steward, and Manager, is bound to keep regular Accounts of his transactions on behalf of his Employer; not only Accounts of Payments, but Accounts of Receipts: and if he has neglected to keep regular Accounts, he will not be permitted to make a demand for Work and Labour in that character, with reference to which, he has kept no Account[v].

[s] Roberts v. Kuffin, 2 Atk. 112. S. C. Barn. 259.

[t] Pit v. Cholmondeley, 2 Ves. 566.

[v] White v. Lady Lincoln, 8 Ves. 369, 371, 375. Lupton v. White, 15 Ves. 432.

And if an *Agent* or *Bailiff* has confounded his Principal's property with his own, he is chargeable for the whole, except what he can prove to be his own.

Bills *for Tythes*, are, as matters of Account, very frequent in the Court of Chancery; but the Jurisdiction of the Chancellor in *Tythe* causes, is, confessedly, no part of his proper and natural Jurisdiction[w]: it is not an original Jurisdiction[x], but was assumed as *incidental* and *collateral* to an Account and Discovery. It was not till after the Restoration that the Jurisdiction of the Chancellor, in this respect, was compleatly established[y]. In the 29th Charles II. Lord Nottingham declared that the Court of Chancery had cognizance in matters of Tythe, as well as the Exchequer, and that the Plaintiff had his choice of the Court[z]. The *Court* of *Exchequer* is the proper Jurisdiction for Tythes[a], that Court having for Centuries taken conuzance of them; the ground of which, probably, was, that *Tythes* were considered as part of the possessions of the Crown, and therefore the *Exchequer*, as a Court of *Revenue*, had Jurisdiction respecting them[b]. Lord Nottingham, however, seems to have dated the origin of the *Exchequer* Jurisdiction over

[w] Gwillim, Tithe Cases, p. 790.

[x] Ib. p. 1086. 2 Ves. jun. 628. 5 Ves. 232. 7 Bro. P. C. 110, 111. Toml. Ed.

[y] Vid. Har. Co. Litt: p. 159[a]. note 290; and see 1 Freeman, 303. 2 Ch. Cas. 237. there cited.

[z] See Gwillim's Tithe Cases, p. 1084.

[a] 3 Atk. 247.

[b] 2 Freem. 27. 2 Ch. Cas. 237. Gwillim 527.

Tythes, in the reign of Henry VIII[c]. There is some difference in these Tythe cases, as to the proceedings in the Court of Chancery and the Exchequer. In the *Exchequer*, an Account of Tythes is decreed, not for the future, but only up to the time of bringing the Bill; but in the *Court of Chancery,* the decree is for an Account of Tythes up to the *time of the Decree*, as said in some cases[d]; or as Lord Hardwicke says, in another case, "down even to the time of the *Master's Report*[e];" or as Baron Clarke says, in a third case, "an Account for Tythes may be carried on, *as long as the suit is depending between the Parties*[f]." It is observable also, that though the Demand for Tythes be ever so small and inconsiderable, yet still a Bill in Equity may be filed for the recovery of them[g].

Where the title to Tythes is clearly made out, the Court of Chancery, or the Court of Exchequer, decrees an Account; and where a *modus* or *real composition* is pleaded and supported by reasonable Evidence, it is the practice to direct an Issue at Law before they decree against the Common Law right of the Parson. The issue from the Court of Chancery is tried in the King's Bench or Common Pleas; and an Issue from the Exchequer, is tried on the Law side of the same Court[h].

[c] Vid. Har. Co. Litt. p. 159. n. 4, and Hard. 236. 1 Freem. 303. there cited.

[d] Vid. 2 Atk. 136. 2 P. Wms. 463. Carleton v. Brightwell.

[e] 2 Atk. 137.

[f] Bell v. Read, 3 Atk.

[g] 4 Bro. P. C. p. 314. Gwillim, p. 736.

[h] Vid. Lygon and Strutt, 2 Anstr. 601. Baker and Athill, 2 Anstr. 493.

By the 37th Henry VIII. ch. 12. s. 19 and 20. it is directed, "that if any variance arise in the city for non-payment of *Tythes*, or if any doubt arise upon the division of any rent, or Tythes, or of any assessment thereof, or upon any other thing contained in this Decree, upon complaint made by the party grieved, the Mayor by the advice of counsel shall call the parties before him, and make a final end with costs, to be awarded by the direction of the Mayor and his assessments according to the decree; but, if the Mayor make not an end thereof within two months, or if any of the parties find themselves aggrieved, the Lord Chancellor, upon complaint made to him, within three months next following, shall make an end in the same with costs." But this particular Jurisdiction thus created did not extinguish the antient Jurisdiction, it being a Rule that an Act of Parliament creating a special Jurisdiction, never ousts the Jurisdiction of Westminster Hall, without special Words[i].

The right of a Court of Equity to decree an Account and payment of Tythes, at the suit of a Person claiming such Tythes, must, as before observed, be grounded on a clear, unquestionable, legal right to Tythes in the Plaintiff, or in some person in

[i] Hard. 116, 130. Kinaston and Millar, 2 Dick. 773. and Warden and Minor Canons of St. Paul's v. Crickett, 2 Ves. jun. 563. and vid. Warden, &c. of St. Paul's v. Morris, 9 Ves. 155. and Antrobus and East India Company, 13 Ves. 9.

[k] Strutt v. Baker, 2 Ves. jun. 628.

Trust for him; the right to the Account being merely consequential to the legal right to the Tythes[1]: and Courts of Equity have, therefore, constantly made a distinction between those cases in which the Title of the Plaintiff, to the Tythes claimed, is not generally disputed; as where it is objected only, that the Lands from which they are claimed are exempt, or discharged from payment of Tythes, or that the Tythes claimed are not payable in kind, but are to be satisfied in some other manner, as by payment of a modus, or composition real; and those cases in which the Title to the Tythes claimed is denied to the Plaintiff, and a Title is set up in another Person. In the first description of cases, the Defendant claiming the benefit of an exemption or discharge, or of a modus or real composition, acknowledges the original Title of the Plaintiff, as alledged by him, but qualifies that Title either by an absolute discharge from payment of the Tythes demanded, or by a right to satisfy that demand, otherwise than by payment of the Tythes in kind. In the second description of cases, the existence of that Title to the Tythes in question, which the Plaintiff claims, is absolutely and totally denied, and it is objected, that the Title is in some other Person: and in these cases if the Person, in whom the Title is thus stated, has had pernancy of the Tythes claimed, the Bill is in effect an Ejectment

[1] Ib. and see Foxcraft v. Paris, 5 Ves. 232, and vid. 7 Bro. P. C. 110, 111. Tomlins's Edition.

Bill, and is to be treated like other Bills in Equity, which may be termed Ejectment Bills, in regard to which, the ordinary practice is, not to make any decree whatever, except for the purpose of assisting the Trial of the Title at Law, where such Assistance is necessary [m].

If a Rector, Impropriator, or Vicar, file a Bill for Tythes, they must waive all penalties and forfeitures [n] under the Statute [o], for otherwise, the Defendant would not be bound to answer; but in a Bill for the single value of Tythes, it is not necessary expressly to waive the treble value [p], the praying of the single value being considered as a waiver of the penalties. A Waiver in Equity is no bar at Law, but only a ground for the interposition of a Court of Equity, which would grant an Injunction against suing for the penalty, as well upon an implied Waiver, as upon the most express [q].

[m] Vid. Garnons v. Bernard, 7 Bro. P. C. 110. 111. Tomlins's Edition; Gwillim's Tythe Cases, p. 1470.

[n] 1 Vern. 60.

[o] 2 and 3 Edw. 6.

[p] Wools v. Walley, 1 Anstr. 100; and see Bunb. 193.

[q] 1 Anstr. 100.

III. Fraud.

TILL the abolition of the Court of Star-Chamber, by statute, (16 Car. I. c. 10,) the Chancellor does not appear to have exercised any very extensive jurisdiction, in cases of *Fraud*[a]. In the Star-Chamber the plaintiff was not only relieved, but the defendant was *punished*, for his fraudulent conduct: so that recourse was generally had to that Court, in cases of Fraud.

When it is considered, what a variety of transactions in Civil matters, may be mixed up with Fraud, every one of which, Courts of Equity have a power of sifting to the bottom, through the oath of the fraudulent party, and of relieving against, some conception may be formed of the very extensive nature of the Chancellor's Jurisdiction on that most fruitful head of Equity.

Before we proceed to the consideration of cases founded in *actual Fraud*, it is proper to state the principles that have been laid down, with a view, *to prevent Fraud.* The doctrine on

[a] See Nott and Hill, 2 Ch. Cas. 120. 1 P. Wms. 310. 1 Wilson 329.

this subject may be classed under the following heads :

1. *Purchases by Trustees and others, in fiduciary situations, of Trust Property.*
2. *Transactions between Attorney and Client.*
3. *Sales or Agreements by expectant Heirs.*
4. *Gifts by Ward to Guardian.*
5. *Injunctions.*
6. *Bills of Peace.*
7. *Bills of Certiorari.*
8. *Bills of Interpleader.*
9. *Bills to perpetuate Testimony.*
10. *Bills of Discovery.*
11. *Bills Quia Timet.*
12. *Bills for the delivery up of Deeds, or for securing them, or the delivering up of specific Chattels.*
13. *Bills to enforce Contribution.*
14. *Bills in Cases of Dower and Partition.*
15. *Bills to establish a Modus.*
16. *Bills to marshal Securities.*

These Subjects will be considered in succession.

1. *Purchases by Trustees and others in fiduciary situations, of Trust Property.*

It is a rule of Equity, that a Trustee shall gain no benefit by any act done by him as trustee, but that such benefit shall accrue to his *cestui que trust*[a]. Upon this principle, and more especially with a view *to prevent Fraud*[b], a trustee is not permitted to become a purchaser of part, or the whole, of the Estate of which he is a trustee[c]. *Commissioners*[d], *Assignees*[e], and *Solicitors*, under a Commission of Bankruptcy, whether bidding for themselves or others, are within the operation of this rule, and are not allowed to purchase the bankrupt's Estate. So, too, a *Committee* is not allowed to purchase the *Lunatic's* Estate[f]; nor, it seems, can an Executor purchase his Testator's Effects[g]. *Governors of a Charity*, for the same reason, are not allowed to take leases of the Charity Lands[h]; and the rule is applied as between *Principal and Steward*[i], and also, to an *Agent*[k]; but not as between Mortgagor and Mortgagee[l].

[a] See Holt v. Holt, 1 Ch. Cas. 191.

[b] Lister v. Lister, 6 Ves. 632.

[c] Herne v. Meeres, 1 Vern. 465. Ex parte Reynolds, 5 Ves. 707. Ayliffe v. Murray, 2 Atk. 59.

[d] Ex parte Hughes, 6 Ves. 617. 12 Ves. 6.

[e] Ex parte Lacey, 6 Ves. 627. York Buildings Company v. Mackenzie, 8 vol. Bro. P. C. p. 42. Tomlins's Edit.

[f] Anon. MS.

[g] Burden v. Burden, 18 Ves. 170.

[h] Attorney Gen. v. Lord Clarendon, 17 Ves. 500.

[i] Ormond v. Hutchinson, 13 Ves. 47. Beaumont v. Boultbee, 5 Ves. 485, 7 Ves. 599. 11 Ves. 358.

[k] Lowther v. Lowther, 13 Ves. 95. Watt v. Grove, 2 Sch. and Lefr. 492; but see Garthside v. Isherwood, 1 Bro. C. C. 558.

[l] See what is said in 2 Sch. and Lefr. 673.

Lord Hardwicke, in *Whelpdale and Cookson*, determined that a Trustee could not even buy at a *Sale by Auction*[k]; and *Lord Eldon* has followed that decision[l].

The reason why Trustees are not allowed to purchase the Trust Property, seems to be, because, from their situation, and the knowledge it enables them to acquire, they may be induced to commit a Fraud upon their *Cestui que Trust*. Nor is it necessary, for the purpose of invalidating such purchases, to shew, (as was unnecessarily[m] done in a great case[n],) that the Trustee has made an advantageous purchase[o], or that there was Fraud[p]. *Lord Rosslyn*, it seems, was of a different opinion[q]; but according to the more recent and approved doctrine of *Lord Eldon*, whether the Bargain be advantageous or not, the Sale is, in every instance, bad; for if a Trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise[r]. So very jealous is the Court of a Trustee taking advantage of his situation to

[k] 1 Ves. 9. and see Decree in that case in 5 Ves. Jun. 682.

[l] Sanderson v. Walker, 13 Ves. 602. In Ex parte Bennett, 10 Ves. 393. Lord Eldon is reported to have said that Lord Hardwicke in Whelpdale and Cookson, "intimated an opinion that a Trustee *might* buy at a Sale by Auction;" but in this he must have been misreported, because Lord Hardwicke in that case expressly decided he could not.

[m] See Ex parte Lacey, 2 Bro. C. C. 627.

[n] Fox against Macreath, 2 Bro. C. C. 400.

[o] Ex parte Bennett, 10 Ves. 393.

[p] Whelpdale v. Cookson, 1 Ves. 9.

[q] See Ib. 385. 395. and Ex parte Lacey, 6 Ves. 627.

[r] Ex parte Bennett, 10 Ves. 385.

benefit himself, that it has been held that, a Trustee could not even purchase, for his own benefit, Property which the owner refused to sell to the *Cestui que Trust.* As, where there was a Church Lease, and the Trustee applied for a Renewal, and the Lessor declared he would not renew for the benefit of the *Cestui que Trust*, and thereupon, the Trustee purchased it, (and without objection in point of morality) for his own benefit; but the Court, considering how little power it has of obtaining a complete discovery in all cases, held, that the Property should be thrown back to the Lessor rather than the Trustee should have it[s]: nor could the *Cestui que Trust*, it seems, under such circumstances, insist on having the Lease[t].

If on a Purchase by a Trustee, it is found to be for the benefit of an Infant *Cestui que Trust* that the Purchaser should be held to his Purchase, it will not be set aside[v].

But though the rule be that a Trustee cannot purchase from himself, he is allowed to purchase from his *Cestui que Trust*, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, and there is no Fraud, no concealment, no advantage taken by the Trustee, of information acquired by him in the character of Trustee[w].

[s] Ib. 395; and see Brewett v. Millett, 7 Bro. P. C. 367. Tomlins's Edit. and Annesley v. Dixon, ib. 213.

[t] See the case, 1 Sch. and Lefr. p. 131.

[v] Sanderson v. Walker, 13 Ves. 603. Lister v. Lister, 6 Ves. 631.

[w] Coles and Trecothick, 9 Ves. 246. approved by Lord

If an Estate be vested in Trustees for Sale for the benefit of an Infant, and the Trustee is desirous of becoming a Purchaser, he may file a Bill, for the purpose of carrying the Trust into Execution, under the direction of the Court, and upon the Sale, apply to the Court for leave to become the Purchaser, upon offering to give more than any other person [x].

2. *Transactions between Attornies and Clients.*

From many cases, it appears that, Attornies are not allowed to deal with their Clients upon exactly the same terms upon which men at large may deal with each other[a]. Transactions liable to no objection as between Man and Man, have, when between Attorney and Client, been overturned, on account of the danger from the influence of Attornies or Counsel over Clients, while having the care of their Property; and whatever mischief may arise in particular cases, the Law, with the view of preventing public mischief, says, they shall take no benefit derived under such circumstances. If the Relation has compleatly ceased, if the influence can be rationally supposed also to cease, a Client may be generous to his Attorney or Counsel, as to any other Person [b].

Erskine, in Morse and Royal, 12 Ves. 373. Fox v. Macreath, 2 Bro. C. C. 400. and see Saunderson v. Walker, 13 Ves. 601.

[x] Campbell v. Walker, 5 Ves. 681.

[a] Newman v. Payne, 2 Ves. Jun. 201.

[b] Wells and Middleton, 4

It is different where the Attorney is also a Relation of the Client, and the Client from motives foreign to his character of Attorney, and from a view to prefer him to other Relations, makes a conveyance to the Attorney, for in such case, it will be supported [c].

A Client may make a voluntary gift to his Attorney or Agent [d], and if unaffected by fraud, misrepresentation, or circumvention, it cannot be set aside [e]; but in such cases, third persons ought, from motives of delicacy and prudence, to be called in; for if not, a suspicion attaches upon the transaction, and so much so, that a Court of Equity will always give a party his costs, where such a transaction is enquired into by proceedings in Equity [f].

An Attorney may *purchase* of his Client, but in such case the Attorney, to support his purchase, must be able to shew that he paid the full amount he could have obtained from any other person [g]. The same Rule prevails, in a Sale by an Attorney to his Client [h].

Bro. P. C. 26, 245. Wood v. Downes, 18 Ves. 127. Oldham v. Hand, 2 Ves. 259; and see Bellew v. Russell, 1 Ball and Beatty, 104.

[c] Bellew v. Russell, ib.

[d] Vid. Walmesley v. Booth, 2 Atk. 30.

[e] See Cray v. Mansfield, 1 Ves. 379. Oldham v. Hand, 2 Ves. 259, 549.

[f] Harris v. Treemenhere, 13 Ves. p. 42; S. C. MS. and see Huguenin and Basely, 14 Ves. 300; Gibson v. Jeyes, 6 Ves. 277. What is said as to an attorney in Morse v. Royal, 12 Ves. 378. and in Wright and Proud, 13 Ves. 138. does not seem warranted by the authorities.

[g] Harris v. Treemenhere, 15 Ves. p. 42. S. C. MS.

[h] Gibson and Jeyes, 6 Ves. 278.

If an Attorney *pendente lite,* or whilst he is doing Business for his Client, prevails upon him to give a Security, or to agree to an exorbitant reward, the Court will interfere[i]: for no Attorney can take any thing, for his own benefit, pending the suit, save his demand[k]. As a Guardian cannot take any thing from his Ward pending the Guardianship, or at the close of it, or at any period, until his influence has ceased to exist; so, the obligation upon an Attorney, to refrain from taking an extraordinary benefit is at least as strong[l]: nor will a subsequent act be considered as a confirmation of the Transaction, unless it be separate and detached, and not done under the force, pressure and influence of the former Transaction[m].

In a case where a Client had given an Attorney a Bond or Mortgage to secure the payment of what was charged to be due to him on account of a Law Suit, the Court relieved the Client, and ordered the Bill to be taxed; on the ground of the great power and influence that an Attorney has over his Client[n].

But though there are cases where the Court has ordered the taxation of an Attorney's Bill, after eight[o], seventeen[p], or twenty-one years, and an actual Security given, and even payment;

[i] Saunderson v. Glass, 2Atk. 298.

[k] Wood and Downes, 18 Ves. 120. Wells and Middleton, 4 Bro. P. C. 26. 245.

[l] 18 Ves. 127.

[m] Ib. 128. and see 2 Sch. and Lefr. 474.

[n] Walmesley v. Booth, 2Atk. 30. See also Newman v. Payne, 2 Ves. Jun. 199. S. C. 4 Bro. C. C. 350; and see Lewis and Morgan, 3 Anstr. 769.

[o] Aubrey v. Popkin, 1 Dick. 403.

[p] Drapers Company v. Davis, 2 Atk. 295.

yet if the Client can point out in the Bill gross errors, amounting to imposition and fraud [q], he may be relieved. The Rule, it has been observed, must not, for the sake of Clients, be carried too far, and so as to prevent professional Gentlemen undertaking long and expensive suits. Every case, therefore, is considered upon its own circumstances, and a temperate and just consideration applied to each case [r]; and where nothing appears but a trifling inaccuracy, the Court will not set aside a Security given by the Client [s].

3. *Sales by expectant Heirs*,

Are, with a view to prevent Fraud, considered in a different light from Sales by other persons. The *Heir* of a Family dealing for an *Expectancy* in that Family, is distinguished from ordinary cases; and an *unconscionable* bargain made with him, is not only looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed. In cases, therefore, of this description, and in cases of Marriage Brokage Bonds, Fraud is not the ground of Relief; it is the example and pernicious Consequences [t]. And in these cases of *young Heirs*, the Court relieves upon general Principles of mischief to the Public, without requiring particular evidence of actual imposition upon them [v]; *Lord Nottingham* seems, in one such case, to have

[q] Cooke v. Setree, 18 Ves. 127.
[r] Ib.
[s] Ib. p. 126. &c.
[t] Gwynne v. Heaton, 1 Bro. C. C. 10: and see Brook v. Gally, 2 Atk. 35. Barnardiston v. Lingood, 2 Atk. 135. Cole v. Gibbons, 3 P. Wms. 293.
[v] Walmesley v. Booth, 2 Atk. 28, 9.

denied relief; but *Lord Jeffereys*, on a rehearing, reversed his decision [w]: and his decree being considered as just, and as discouraging a growing practice, of "*devouring an heir*," to use *Lord Cowper's* expression, no attempt was made in Parliament to reverse it [x]. In another case, however, *Lord Nottingham* seems to have agreed with the doctrine of *Lord Jeffereys* [y]. On these Principles, where a Son, who after his Father's death, was a remainder-man in Tail, sold his remainder, at an *under rate*, it was set aside [z]. An expectancy may be sold, provided it is fairly sold; but the Court in favor of young Heirs says, the Vendee shall shew that the Bargain was a fair one [a]. Indeed, *Lord Hardwicke* has expressly said that, "the taking undue advantage of an Heir's being in distressed and necessitous circumstances is the principal ground of these Decrees [b]."

Inadequacy of Consideration between Persons, who stand upon a precisely equal footing, is, in Courts of Equity, of no account, unless from its grossness it is of itself, (as will be seen more at large hereafter,) Evidence of Fraud; but in regard to expectant Heirs, any thing that can substantially be considered as Inadequacy, is a ground for setting aside the contract [c]; and in such

[w] Berney v. Pitt, 2 Vern. 14.

[x] Twisleton v. Griffith, 1 P. Wms. 311, 212.

[y] Nott v. Hill, 1 Vern. 168. dismissed on a re-hearing by Lord North, but Lord Nottingham's decree affirmed on a rehearing by Lord Jeffereys, 2 Vern. 27.

[z] Twisleton v. Griffith, 1 P. Wms. 310; and see Wiseman v. Beake, 2 Vern. 121. where a Nephew, near forty years old, was the remainder-man.

[a] See what is said in Coles and Trecothick, 9 Ves. 246. and in Evans and Cheshire, MS.

[b] Barnardiston v. Lingood, 2 Atk. 134.

[c] Peacock v. Evans, 16 Ves. 517: and see Gowland and De Faria, 17 Ves. 24.

case the conveyance is set aside on payment of Principal, Interest, and Costs, the defendant being considered as a Mortgagee[d].

The tendency of these determinations to render all Bargains with expectant Heirs very insecure, if not impracticable, seems not to have been considered as operating to prevent its adoption and establishment; but, on the contrary, some Judges have avowed that probable consequence, as being to them, a recommendation of the Doctrine[e].

In most of these cases, deceit and illusion on third persons, not parties, nor privy to the fraudulent Agreement, have concurred; the Father, Ancestor, or Relation, from whom was the expectation of the Estate has been kept in the dark; and the Heir or Expectant has been kept from disclosing his circumstances, and resorting to them for advice which might have tended to his relief and reformation. This misleads the Ancestor, who has been seduced to leave his Estate, not to his Heir or Family, but to a set of artful persons who have divided the spoil beforehand[f].

It has also been determined that, if Tradesmen, on various occasions, impose upon an expectant Heir, by selling at extravagant prices, a Court of Equity will relieve; but it might be otherwise, if there were only a single instance, of a purchase[g].

[d] See Gowland and De Faria, 17 Ves. 23.

[e] Per Master of the Rolls in Peacock v. Evans, 16 Ves. 514, 515.

[f] Chesterfield and Jansen, 2 Ves. 157.

[g] See Bill v. Price, 1 Vern. 467. Lamplugh v. Smith, 2 Vern. 77. Whittey v. Price, 2 Vern. 78. Brooke v. Galley, 2 Atk. 35.

In some of the cases, a distinction has been taken, where the Heir has no maintenance from his Father, and is turned out upon unreasonable displeasure taken by the Father; in which case, if the Bargain is not excessively beyond the proportion of insurances for such risques, such Bargain is allowed to stand, because it is not to supply the Luxury and Prodigality of the Heir, but to keep him from starving; and since the Seller would have lost his money in case the Heir had died during the life of the Father, he ought to have a proportionable benefit for such hazard [h]. The Court, in relieving an Heir against fraud, does not consider whether the Estate in expectancy comes to him as heir to his father, and by descent, or from any other relation; but the rule which directs in such case, is the necessity that young heirs are in for the most part, which naturally lays them open to impositions of this kind. Where an extravagant price is charged for goods sold, and a mortgage is taken to secure it, the Heir may be relieved so far as it stands as a security for the unjust gain; but after it is determined, upon a *quantum meruit*, what was the real worth of the goods, the mortgage will still be binding upon the Heir, for so much as is found by the verdict [i].

A *Post Obit* given by an *Expectant Heir*, has been held bad [k]; but if afterwards, on the death of the

[h] Sir Robert Jason's case, Lex Prætoria, MS. Nott and Hill, 2 Ch. Cas. 120. Barney and Blake, ib. 136. but see 1 Bro. C. C. 10.

[i] Freeman v. Bishop, 2 Atk. 39. S. C. Barnard. 15.

[k] Varnee's Case, 2 Freem. 63.

person upon whose decease the Post Obit is payable, the transaction is, without imposition, *confirmed*, it cannot be set aside; nor can relief be had, except as to the Penalty[l]: for a new Agreement may confirm what was at first a *doubtful Bargain*, though it could not a *void one*[m]; but if the confirmation is not freely given; if the Party be poor, or distressed, or under the influence of the former transaction, it is not an effectual confirmation[n].

If a Post Obit be given, and the Obligor and Obligee of the Bond die, as well as the person on whose Life it was given, and the Bond has been assigned, it will not be set aside, no proof of imposition appearing[o].

The same protective influence, to prevent Fraud, is exercised in the case of,

4. *Guardian and Ward.*

Where a Man acts as Guardian, or Trustee in nature of a Guardian, for an Infant, a Court of Equity is extremely watchful to prevent such person taking any advantage immediately upon his Ward or *Cestui que trust, coming of age, and at the time of settling his account, or delivering up the Trust;* because an undue advantage may be taken. It would give an opportunity, either by flattery, or by force, by good usage unfairly meant, or bad usage imposed, to take such advantage:

[l] Chesterfield v. Janson, 2 Ves. S. C. 1 Atk. 301.

[m] See 1 Atk. 354; and see Cole v. Gibbons, 3 P Wms. 294.

[n] Clowe v. Ballard, 1 Ves. jun. 215. S. C. 3 Bro. C. C. 117.

[o] Hill v. Caillord, 1 Ves. 123.

and therefore the Principle of the Court is of the same nature with relief in Courts of Equity on the head of public utility, as in Bonds obtained from young Heirs, and Rewards given to an Attorney pending a Cause, and Marriage Brokage Bonds. All depend on public utility, and therefore the Court will not suffer it, though perhaps, in a particular instance, there may not be actual unfairness [p]. The Rule is, in some cases, productive of hardship ; as where there has been great Trouble, and the Guardian has acted fairly and honestly ; but Courts of Equity have established it from a persuasion of its utility, and on necessity, and on the principle that it is a debt of humanity that one Man owes to another, as every Man is liable to be in the same circumstances [q]. If, however, the Ward or Cestui que trust, comes of age, and after actually being put into possession of his Estate, thinks fit, when *sui juris* and at Liberty, to make a reasonable grant, by way of reward for care and trouble, and does this with his eyes open, Courts of Equity will not set such Gift aside; but the Court will not permit a Gift, *at the very time of accounting and delivering up the Estate*, making that the terms of doing their duty [r].

Conveyances of this description have been set aside not only by the Ward himself, but his

[p] Hylton v. Hylton, 2 Ves. Sen. p. 547.

[q] Ib. p. 549.

[r] See Ib. p. 549. Cray v. Mansfield, 1 Ves. 379. Griffin and De Veuille, 3 Wood. Lect. in Appendix, p. 18.; and see what is said in Wright and Proud, 13 Ves. 138. and in Wood and Downes, 18 Ves. 127. Smith v. Moone, MSS.

Representatives [s], and after great length of time [t]. On these principles, where a Gift of Stock was made by a Ward to his Guardian, *immediately upon his coming of Age*, and before his Guardian had delivered over every thing to his Ward, the Deed of Gift was decreed to be delivered up to be cancelled. The Guardian insisted that the Gift to him was as a Reward for his trouble as Guardian, but this Defence was not admitted [u].

So, where a Husband *before* his Marriage covenanted to release his Wife's Guardian of all accounts: this was held not to be binding, and was said to resemble a Marriage Brokage Agreement [v].

In like manner, a voluntary Grant of an Annuity by a Ward, a year after he was of Age, to his Guardian, at the time when the Guardian pretended to come to an Account and deliver up the Estate to the Plaintiff, was set aside [w].

The *Lord Keeper North* said, that a Release obtained, as soon as ever the Heir came of Age, by the Guardian, should never by him be thought a trick, but that it was the proper time for such a Release; but *Finch* said, it had been held otherwise [x].

5. *Injunctions.*

Injunctions are in general granted to prevent Fraud, or Injustice, and may be classed under this head of Equity.

[s] 2 Ves. 547.
[t] Hatch v. Hatch, 9 Ves. 292.
[u] Pierce v. Waring, cit. 2 Ves. 547, 549.
[v] Duke of Hamilton and Ux. v. Lord Mohun, 1 P. Wms. 118.
[w] Hylton v. Hylton, 2 Ves 547.
[x] Anon. Skin. 148.

The Jurisdiction of the Court as to Injunctions, has been considered as a most useful one; without which, the benefit of an Equity, against proceedings at Law, could not be had; but as they may be made use of as handles to delay the obtaining justice at Law, it has been thought the duty of the Court to prevent, as much as possible, the abuse of that Jurisdiction [y].

All Injunctions are discretionary, and granted upon the circumstances of the Case [z]. Of late years, they have been allowed much more liberally than formerly [a].

An *Injunction*, however, can only be obtained against a Party to the suit; and in the ordinary case of an Injunction after a Decree, in the absence of a Creditor, no one appearing for him as Counsel, which might make a difference, it seems he could not be proceeded against for a breach of the Injunction [b].

An *Injunction* is a *prohibitory Writ*, *specially prayed* for, by a Bill in which the Plaintiff's Title is set forth [c], restraining a Person from committing or doing an Act, (other than *criminal* Acts [d],) which appears to be against Equity or Conscience [e]. Sometimes the Injunction precedes, and sometimes it is subsequent to a Decree. It may be obtained at various stages of a suit, according to the Circumstances of the

[y] Travers v. Lord Stafford, 2 Ves. 20.

[z] Potter against Chapman, Ambl. 99.

[a] Hanson v. Gardener, 7 Ves. 307.

[b] Iveson v. Harris, 7 Ves. 257,8.

[c] Mitf. Pleading, p. 124.

[d] See 6 Mod. 16.

[e] 3 Bacon's Abr. 648.

case. If the Injunction be wanted to *stay waste*, or other Injuries of *an equally urgent* nature, upon the filing of the Bill, and an Affidavit, verifying the urgency and necessity of the Case, the Court will on *Motion* made, *before the service of the Subpœna*, and without Notice to the opposite Party [e], or if in the *Vacation*, or between the Seals, on a *Petition* and Affidavit, and Certificate of the Bill filed, grant an Injunction immediately, to continue till the defendant has put in his answer, and the Court shall make some further Order concerning it. When the answer comes in, the Defendant may move to dissolve the Injunction, and the Court will on such Motion order the Injunction to stand dissolved at a short day fixed by the Court, unless cause is shewn to the contrary, and whether it shall then be dissolved or continued till the hearing of the cause is on such day determined by the Court, upon Arguments drawn from considering the Answer and Affidavit together, or if no cause is shewn, then upon Motion, and an Affidavit of the due service of the Order, the order for dissolving the Injunction will be made absolute; but these are matters of Practice, and will be more fully considered, when we come to treat of the Practice of the Court.

An Injunction is proper, and may be obtained,

[e] An Injunction against waste will be granted, though the defendant appear the day before the motion, Aller v. Jones, 15 Ves. p. 605. Perhaps it might be different where he had appeared long enough to have enabled the plaintiff to give notice. See ib.

in the following cases:—1. *To stay proceedings in other Courts, as in the Exchequer, the Spiritual Court, or Court of Admiralty, or to stay proceedings in a Court of Law;* 2. *To restrain the Infringement of Patents;* 3. *To stay waste;* 4. *To restrain the Sale of Books, Printed Music, or Prints;* 5. *To restrain the Negotiation of Bills of Exchange, Notes, &c. or the Transfer of Stock;* 6. *To prevent the committing of Nuisances.* These are the principal cases in which Injunctions are granted; but there are other occasions, in which they are granted, not classable under those heads, but which will, however, be considered. And, 1. *As to an Injunction to stay Proceedings in other Courts.* Such Injunction may be obtained where there is a concurrent Jurisdiction, or where something is suggested which affects the equitable right of the Party in the Proceedings in the other Court. Where two Courts have a concurrent Jurisdiction of the same thing, that Court is entitled to retain the Suit in which it is commenced, and may enjoin any other Court from proceeding in the Suit.

It has, however, been decided[a], that if a Bill is brought in the Exchequer to foreclose, the Defendant may file a Bill in the Court of Chancery to *redeem*, and that a plea of the former Suit cannot be sustained. It may be true that such *Plea* is bad; but the Court of Exchequer, perhaps, might on application have given the Party relief by means of an Injunction.

[a] Earl of Newburgh v. Wren, 1 Vern. 220.

So in those Cases in which the Court of Chancery and the *Spiritual Courts* have a concurrent Jurisdiction, the Court of Chancery will not (with some exceptions that will presently be mentioned,) hinder the Spiritual Court, being first possessed of the Suit, from proceeding in it[b].

If a Suit is instituted in the *Spiritual* Court for *Tythes*, and a *Modus* is set up as a defence, the Court of Chancery or of the Exchequer will grant an Injunction to stay proceedings in the Spiritual Court[c]; but if a Suit is there instituted for subtraction of Tythes, and the Defendant brings a Bill to establish a Modus, and on the bare suggestion of a Modus, moves for an Injunction to stay the proceedings in the Ecclesiastical Court, it will not be granted. If, indeed, the *Modus* pleaded is *admitted*, the Ecclesiastical Court may then proceed upon the Modus; but if *denied*, that Court cannot proceed, *propter triationis defectum*[d]; but where a Bill was brought in the Ecclesiastical Court to establish *Modusses*, *some of which* the Defendant admitted, and *denied the rest and greatest part*, the Court of Exchequer granted an *Injunction*[e].

The Court of Chancery will, on a Bill filed, grant an Injunction to the *Spiritual Court*, to stay a *Husband's* proceedings in that Court to

[b] Prec. Ch. 546.
[c] 1 Fowler, 311; see Bunb. 176.
[d] Rotheram v. Fanshaw, 3 Atk. 627.
[e] Bunb. 176.

obtain a *Legacy* given to his *Wife;* because that Court cannot oblige the Husband to make an adequate Provision or Settlement on his Wife, as the Court of Chancery will oblige him to do, before it will permit him to receive the Legacy[f].

Where a Suit is instituted in the *Spiritual Court* for an Infant's Legacy, by a Father, the Court will grant an Injunction, because it will not allow the Money of an Infant to come into the Father's hands. It does not grant the Injunction, because the Spiritual Court have not a Jurisdiction in Legacies, but from the general care it takes of Infants[g].

In all *Cases of Legacies*, where there is a *Trust*, or, as it has been said, *any thing in the nature of a Trust*, the Court of Chancery will grant an Injunction, *Trusts* being proper only for the Cognizance of that Court[h].

An Injunction to stay proceedings in the *Admiralty Court*, in a Suit for the condemnation of a Ship, on the ground that a note had been obtained by duress from the Captain, acknowledging the Right of capture, has been refused, as the Court of Admiralty has sufficient Authority to investigate the circumstances[i].

An Injunction may likewise be obtained *to stay proceedings in* a Court of *Law*. Such Injunctions

[f] Prec. Ch. 548; see also Meal v. Meal, 1 Dick. 373. Anon. 1 Atk. 491.

[g] Rotheram v. Fanshaw, 3 Atk. 629.

[h] Anon. 1 Atk. 491; see also 1 Dick. 98. Stonehouse v. Stonehouse, 2 Dick. 769. Smith and Kempson.

[i] Anon. 3 Atk. 350.

issue by the order and under the Seal of the Court, not on Account of any Supremacy which the Court assumes over a Court of Law, but in respect of its Jurisdiction in a Court of Equity, by which it controuls the *Party*, and not the *Court*, from proceeding at Law [k]. The Court of Chancery in these cases admits the Jurisdiction of the Court of Common Law; and the ground on which it issues the Injunction, is, that the Parties are making use of the Jurisdiction contrary to Equity and Conscience [l].

Such Injunctions are sometimes used to stay *Trial*, or after a Verdict to stay *Judgment*, or after a Judgment to stay *Execution*, or *proceedings* under an Execution [m]; or if Execution has taken place, to stay the Money in the hands of the Sheriff; or if *part* only of a Judgment Debt has been levied by a *Fieri facias*, it may issue to restrain the suing out of a *Capias ad satisfaciendum*. And where such Injunctions are prayed by the Bill, there is commonly a suggestion in it, such as that the Complainant is not able, for some reasons therein stated, to make his defence in the other Court, though he hath a good discharge in Equity, or that the other party proceeds at Law for a penalty, and threatens to make the complainant pay, or that the other Court has not jurisdiction of the cause, which is cognizable in the Court where he files his Bill, or that the other Court refuses

[k] See what is said, 1 Atk. 630.

[l] Hill v. Turner, 1 Atk. 516.

[m] See Lady Arundel and Phips, 10 Ves. 144. Codd against Woden, 3 Bro. C. C. 73.

some rightful advantage, or does injustice to him in the proceedings, or has not power to do him right [n].

In the Exchequer, an Injunction stays all Proceedings in whatever stage they are; but it is not so in *Chancery;* for there, if on a service of the Injunction the Defendant hath not commenced his Action he cannot sue out Process: if he hath, but not served the same, or in case he hath, but hath not delivered or filed any Declaration, he cannot proceed; but if there has been a declaration, he may call for a Plea, and for want of it sign a Judgment, or if the cause is at Issue, he may go on to Trial, and if that hath been had and a verdict obtained, he may proceed to Judgment and affirm, if Error hath been brought; but if Judgment hath been executed, and Debt and Costs levied thereon, the Sheriff cannot pay the same to the Defendant, *Execution being stayed*, till Answer and further order [o].

Where a Defendant is *abroad*, there must be special ground to shew that the discovery required from him is material, before an Injunction will be granted [p]; nor will an Injunction be extended to *stay Trial* just at the time of the Assizes, unless the Plaintiff will give Security for the Costs [q].

It is not necessary to state in detail, all those various occasions in which a Court of Equity inter-

[n] Prac. Reg. Wyatt's Edit. p. 232.

[o] See 1 vol. Hind, p. 222.

[p] Revet against Braham, 2 Bro. C. C. 640.

[q] Blacoe v. Wilkinson, 13 Ves. 454.

feres by Injunction to restrain Proceedings at Law. It is a general Rule, illustrated by an abundance of cases, that wherever a Party by Fraud, Accident, or otherwise, has an advantage in proceeding in a Court of ordinary Jurisdiction, which must necessarily make that Court an Instrument of Injustice, a Court of Equity, to *prevent a manifest wrong*, will interpose, by restraining the Party whose conscience is thus bound, from using the advantage he has improperly gained[r]. In most of those cases of Accident, Mistake, or Account, which have been dilated upon, and in which equitable relief is afforded, a party proceeding at Law would be restrained; and so he would in the generality of those cases of Fraud which will hereafter be considered. In short, wherever a legal right would be relieved against in a Court of Equity, an Injunction will be granted to restrain proceedings at Law, in respect of such legal right.

If, for instance, a Bond, Promissory Note, Policy of Insurance, or the like, has been unfairly procured, Injunction may be obtained against proceedings at Law. As where the Bond or Note, was contrary to the Policy of the Law, and void[s]; as for bringing about a Marriage[t], or where a Note was obtained for Money won at play[v], or where, on a Policy of Insurance, the Life insured was, at

[r] See Mitford's Pleadings, 116.

[s] See Cook v. Richards, 10 Ves. 429.

[t] 3 Atk. 566. Ambl. 66.

[v] ——— v. Blackwood, 3 Anstr. 851.

the time of the Insurance, in a state of Health very different from what it was represented to be [w]; and other multifarious cases of a similar description.

So, likewise, the Court will enjoin Proceedings in Ejectment, where otherwise the execution of Trusts decreed by the Court, would be overturned; as where the Court had decreed a Partition and Conveyance of an Estate, so that an Ejectment brought tended to overturn the decree of the Court [x].

So, a Bill will lie for a discovery, and an Injunction to stay proceedings, on the ground of a *Verdict* obtained by *Collusion* and *Fraud* [y].

If an Execution be issued on Account of a separate debt of one Partner against the Partnership Effects, a Bill may be filed by the solvent Partners, to take an Account of what is due to such Partner, and for an Injunction in the mean time; for under such an Execution, the Creditor is only entitled to the Interest his Debtor has in the Partnership Property [z], after the Accounts are wound up, as hath before been remarked.

And upon the same principle if a separate commission be issued against one Partner, on an act of Bankruptcy, previous to the issuing of a Foreign Attachment by a Joint Creditor

[w] See 3 vol. Woodeson's Lect. p. 410.

[x] Baker v. Hart, 1 Ves. 29.

[y] Isaac v. Humpage, 1 Ves. jun. 427. S. C. 3 Bro. C. C. 463.

[z] Taylor v. Field, 4 Ves. 396; and see Dutton v. Morrison, 17 Ves. 209; and see Barker v. Goodair, 11 Ves. 85.

against the Joint Property, an Injunction may be obtained, till the Partnership affairs are wound up [a].

But it has been holden, that the Chancellor has no Jurisdiction to stay, by Injunction, the Process of a Court of Law, upon an Award, made a Rule of Court under the stat. 9 and 10 Wm. 3. c. 15 [b]. It would be different, it seems, if the Award were made in the course of a Cause [c].

2. An *Injunction may be obtained to restrain the Infringement of Patents.* As, where Persons get a *Patent* and have been in *possession* of it, (a Sale of the invention is considered as possession,) an Injunction will be issued against a Person invading it, until the right is tried at Law; and this, although the Chancellor may be *doubtful* whether the Patent is good [d]. If he was *clear* the Patent was bad, it seems he would not enjoin [e]. Formerly, in the case of a Patent, on opening the case, the Party was sent to Law, to establish his right; and then came back for an Account [f].

If a Patent for an invention is restrained to England, it will not extend to Ireland. There must be a distinct Patent under a distinct Great

[a] Barker v. Goodair, 11 Ves. 78.

[b] Gwinett v. Bannister, 14 Ves. 530.

[c] Ib. p. 532.

[d] Harmer and Plane, 14 Ves. 130; and see the Universities of Oxford and Cambridge v. Richardson, 6 Ves. 707. In Newsham v. Gray, 2 Atk. 286, an Issue appears to have been directed, but no Injunction in the mean time; and see Hill v. University of Oxford, 1 Vern. 275.

[e] See Grierson v. Eyre, 9 Ves. 341.

[f] Dodsley against Kinnersley, Ambl. 406. Anon. 1 Vern. 120.

Seal for Ireland[g]. And the right in a Patent for one Country, is confined to that, and will not enable the Party to bring the Article for Sale into the other[h].

There must be separate Bills upon distinct invasions of a Patent[i].

3. *Injunctions to stay Waste*, are very frequently applied for in Chancery; and a mere *threat* to commit Waste is sufficient to ground an Injunction upon; it not being necessary for a Plaintiff to wait till the Waste is actually committed[k]. Where the *Title is doubtful*[l], *or disputed*, as between Devisee and Heir at Law[m], or otherwise[n], an Injunction will not be granted. But in general, it seems, it may be obtained to stay Waste, on the part of a Person or Persons, (even of a child in *ventre sa mere*[o],) having the next immediate *vested Estate of Inheritance* in the subject matter of the waste. Trustees to preserve Contingent Remainders, may, before the Contingent Remainder-man comes *in esse*, obtain an Injunction to stay Waste[p].

An Injunction may also be obtained by Persons entitled only to *Contingent*[q], and *executory Estates*[r] of Inheritance, against Tenant by the *Cur-*

[g] 6 Ves. 718.
[h] Ib.
[i] Dilly v. Doig, 2 Ves. jun. 487.
[k] Gibson v. Smith, 2 Atk. 183. S. C. Barn. 491.
[l] Field v. Jackson, 2 Dick. 591.
[m] Smith v. Collyer, 6 Ves. 89.
[n] Anonymous, 6 Ves. 51.
[o] Robinson v. Litton, 3 Atk. 211.
[p] Garth v. Cotton, 3 Atk. 754. S. C. 1 Ves. 524, 546. and also S. C. 1 Dick. 183. where Lord Hardwicke's argument is given from his own notes.
[q] Williams v. Duke of Bolton, 3 P. Wms. 268. in note 1.
[r] See Hayward v. Stilling-

tesy, in *Dower*, or as *Guardian* [s], or against him who has a legal Estate of Inheritance, but being a *Trustee* is not liable to an Action of Waste [t], to inhibit them from committing Waste, on Houses, Lands, or Woods, by defacing or pulling down Buildings, digging Mines, or felling Timber [v].

It may be obtained, also, by such persons, against a Tenant in Tail after possibility of Issue extinct [u], or a Tenant for Life without impeachment of Waste, taking the produce of Mines *unopened* [w], (unless they be new Pits or Shafts for the working an old vein of Coals [x],) or committing malicious and extravagant Waste [y]: the clause, "*without impeachment of Waste*," never

fleet, 1 Atk. 425; and see Perrot v. Perrot, 3 Atk. 95. Robinson v. Litton, 3 Atk. 209, 11. Fearne on Executory Devises, p. 536. Edit. 4.

[s] Clarke and Thorpe, 2 Ves. 233.

[t] 2 Ch. Ca. 32. 3 Wood. Lect. 399.

[v] What is Timber must be determined by the Custom of the Country. By Custom, some Trees are considered as Timber, which in their nature, generally speaking, are not so, as Horse-Chesnut and Lime Trees, Birch, Beech, and Asp, and Walnut Trees. Duke Chandos v. Talbot, 2 P. Wms. 606. Pollards, it seems, are considered as Timber, if the Bodies of them be sound and good; ib. overruling what is said in Toby v. Molyns, Plowd. 470. The Right to Timber belongs to those who at the time of its being severed from the Freehold, whether by the Act of God, as by Tempest, or by a Trespasser and by wrong, have the first Estate of Inheritance, whether in Fee or in Tail, and they may bring Trover for it; but it has been holden that a Tenant in Tail expectant on the determination of an Estate for Life, without impeachment of Waste cannot maintain Trover for Timber cut down. See Whitfield v. Bewit, 2 P. Wms. 240. and S. C. 3 P. Wms. 268; and see Harg. and But. Co. Litt. 218 b. n. 2. Pyne v. Dor, 1 T. R. 55.

[u] Abrahall v. Bub, 2 Freem. 53. 278. 2 Cha. Ca. 32. Williams and Williams, 15 Ves. 419.

[w] Tracey against Hereford, 2 Bro. C. C. 138. Whitfield v. Bewit, 2 P. Wms. 242.

[x] Clavering v. Clavering, 2 P. Wms. 388. S. C. Sel. Cas. 79.

[y] 2 Freeman, 52. 2 Cha. Ca. 32.

being extended to allow the very destruction of the Estate itself, but only to excuse from *permissive Waste*[y].

By the *Common Law*, the clause, *without impeachment of Waste*, only exempted a Tenant for Life from the penalty of the Statute, the recovery of treble value, and the place wasted; but did not give the *property* of the thing wasted. In *Lewis Bowle's* Case[z], it was first determined that these words also gave the *property*: the necessary consequence of which decision was, that in general, and unless under particular circumstances, he was not to be restrained in Equity[a].

But Courts of Equity have restrained his power greatly, in comparison of what it was formerly[b]. And in *Lord Bernard's* Case, (the strongest that could happen,) *Lord Cowper* restrained the Tenant for Life from pulling down *Ruby Castle*[c]; but that was not an original Case, without precedent or judicial opinion to support it, as appears from a Case, 5 Jac. 1[d]. Afterwards the Court proceeded still farther, and restrained such Tenant for Life, from cutting down Timber either for *ornament* or *shelter* of the House, and from cutting down Trees in *lines*, or *avenues*, or *ridings* in a Park, and likewise from cutting down Trees that were *not of a proper growth* to be cut[e], and

[y] Prec. in Cha. 454. —— v. Copley, MS.

[z] 11 Co. 79; but see 3 Atk. 215.

[a] Alston v. Alston, 2 Ves. 265, 266.

[b] 3 Atk. 215.

[c] Vane v. Lord Bernard, 2 Vern. 738. S. C. Prec. Ch. 454.

[d] Mentioned 1 Ves. 265.

[e] Packington's Case, 3 Atk. 215. 1 Ch. Cas. 166; but see what is said in Aston v. Aston, 1 Ves. 266.

even from cutting *decayed* Timber[f]; or cutting so much Timber as not to leave enough for Repairs[g]. But subject to the doctrine as to *Equitable Waste*, (a doctrine not to be extended[h];) a Tenant for Life unimpeachable for Waste, is at liberty to cut Timber generally, treating it in a Husbandlike manner, independent of the effect upon the beauty of the Place[i]: there being no such Law in this Country as that made by a King of France, (Philip le Belle) in the fourteenth Century, which made it penal to cut a Tree, *qui a este garde pour sa beauté.*

It is not Waste to cut Timber, where necessary for the growth of the underwood in which it is situated[k]; neither is it Waste to cut Timber merely ornamental, unless it *was planted and growing for ornament, such as Vistas* and *Avenues*[l]. This Principle, however, does not, it seems, extend to a *Wood* covering *thirty Acres*[m]; but it extends to prevent the cutting down of Trees planted for the purpose of *excluding objects from view*[n].

If a Testator, or Author of the Deed creating a Tenancy for Life, has planted for ornament, though his taste be very disgusting, yet the taste of a Testator, like his Will, is binding, and the Court will

[f] Perrot v. Perrot, 3 Atk. 95. As to whom decayed Timber belongs, see Whitfield v. Bewitt, 3 P. Wms. 268.
[g] 1 Ves. 264.
[h] 16 Ves. 185.
[i] Ib. 185.
[k] Burgess v. Lamb, 16 Ves. 179. and Knight and Duplessis, 2 Ves. Sen. 361.
[l] Burgess and Lamb, 16 Ves. 183.
[m] Ib. 185.
[n] Day and Merry, 16 Ves. 375.

not permit a Tenant for Life to destroy Plantations so intended for ornament. The Principle has been extended from ornaments of the House to Outhouses, and Grounds, and to Plantations, Vistas, Avenues, and to all the rides about the Estate, for ten miles round; but, it is not a sufficient ground for an Injunction that the Trees are ornamental, not to the Estate upon which they grow, but to the surrounding Country. If the Court has any doubt whether Trees be really ornamental or not, it will direct an Issue, taking care at the same time that, if in the result of such a direction, the Defendant should be prejudiced by not being permitted to cut in the mean time, the Plaintiff shall undertake to pay the value, if the decision should be against him[n].

A Tenant for Life has been restrained from cutting down clumps of Fir, on a Common two Miles from the House, which had been planted *for ornament.*

The terms of Injunctions in these cases, usually are, " that an Injunction be awarded to restrain the Defendant, his servants, workmen, and agents, from committing Waste, Spoil, or Destruction, in the mansion or other houses, upon the Estates in question, and from cutting down Timber, or other Trees growing upon the Estate, which are planted, or growing there for the protection or shelter of the several mansion houses, belonging to the Estates, or for the ornament of the said houses,

[n] See Marquis of Downshire v. Lady Sanderson, 6 Ves. 110.

or which grow in lines, walks, vistas, or otherwise for the ornament of the said houses, or of the gardens, parks, or pleasure-grounds, thereunto belonging; and also to restrain the Defendant, his servants, &c. from cutting down any Timber or other Trees, except at seasonable times, and in a husbandlike manner, and likewise from cutting Saplings, and young Trees not fit to be cut, as and for the purposes of Timber, except in the spring woods, and from cutting any thing in the spring woods but in a husbandlike manner, until hearing or farther order[o]."

Such being the usual order in these cases, the Court will not alter the Terms, and insert the words, "*contribute to ornament*[p]."

An Injunction may be obtained where there is Tenant for Life, subject to Waste, remainder for Life dispunishable for Waste, remainder in fee; for the Court will not suffer an agreement between the two Tenants for Life to commit Waste, to take place against a Remainder Man, before the time comes when the second Tenant's for Life power commences[q]. So, an Injunction is obtainable against a Jointress[r], or a Mortgagor[s], or a Mortgagee in Fee[t], or for Years[v]; but if a Mortgagor

[o] See Lord Tamworth v. Ferrers, 6 Ves. 419. see also the Injunction in O'Brien v. O'Brien, Ambl. 108.

[p] Williams v. Macnamara, 8 Ves. 71.

[q] Robinson v. Litton, 3 Atk. 210; and see Garth v. Cotton, 3 Atk. 755. and the cases there mentioned by Lord Hardwicke.

[r] 1 Ves. 264.

[s] 3 Atk. 723. and Usborne v. Usborne, 1 Dick. 75. and the several cases there mentioned.

[t] Farrant against Lee, Ambl. 105. and see Robinson v. Litton, 3 Atk. 210.

[v] 3 Atk. 723.

cuts Wood and Underwood at seasonable times, and of proper growth, it will not be considered as Waste[w]. An Injunction lies also against a Lessee for Years, manifesting an intention of committing Waste[x]; but a Lessee threatening to remove Straw and Dung, contrary to his covenant, is not considered as a case of Waste, but as a breach of contract[y]. A Bill for an Injunction will lie by a ground Landlord or a Termor at ground Rent against his Lessee[a], and against an *under Lessee*[b]. An Injunction is never granted *against* a Person having the *Inheritance* unless he is only a Trustee, or in such like special Case[c]. Where an Infant, Tenant in Tail, not likely to live till of age, by his Guardian cut down a great quantity of Timber, an Injunction was refused, on behalf of a Remainder-man, to restrain him[d].

An Injunction is obtainable, on a Bill filed by the Patron of a Living to restrain a Rector from cutting Timber in the Church-yard, till the hearing, except for repairing the Parsonage House, Outhouses, Chancels or Pews[e]. And such a Bill lies not only by the Patron of a living to stay Waste[f];

[w] Hampton v. Hodges, 8 Ves. 105.

[x] 1 Roll's Abr. 380. Bishop of London v. Web, 1 P. Wms. 527. and see Lord Courtown v. Ward, 1 Sch. and Lefroy, p. 8. Where a Lessee covenants to manage the Land, in a Husbandlike manner, ploughing up pasture Land is considered as Waste, see 3 Anstr. 750; but see Lord Grey de Wilton v. Saxon, 6 Ves. 116. Drury v. Molins, 6 Ves. 320.

[y] 3 Anstr. 749; but see case in note there.

[a] Farrant against Lee, Ambl. 105.

[b] Farrant v. Lovell, 3 Atk. 723. Ambl. 105.

[c] Prac. Regr.

[d] Mr. Saville's Case, mentioned, For. 6.

[e] Strachy v. Francis, 2 Atk. 216.

[f] Knight against Moseley, Ambl. 176.

but where the Living is vacant, an Injunction lies against the Widow of the Rector committing Waste[g]. A Rector may cut Timber, and he is also entitled to Botes, for repairing Barns and Outhouses, belonging to the Parsonage; but he may not cut down Timber, for any common purpose. If, however, it is the Custom of the Country, he may cut down *underwood* for *any* purpose; but if he grubs it up it is Waste. An Injunction may be obtained, at the instance of the Attorney General, against a Bishop to restrain the felling of great quantities of Timber[h].

Formerly, in a case of Trespass, unless it grew to a nuisance, an Injunction would have been refused[i]; but latterly an Injunction to stay Waste has been granted, in cases of Trespass, (unless, perhaps, where the title is disputed[k];) as where a person having got possession under articles to purchase, cuts Timber[l].

It seems questionable whether the Lord of a

[g] Hoskins against Featherstone, 2 Bro. C. C. 552.

[h] Knight against Moseley, Ambl. 176.

[i] See Hanson v. Gardiner, 7 Ves. 307. Mogg v. Mogg, 2 Dick. 670.

[k] In Kinder v. Jones, 17 Ves. 110, a doubt was made by the Chancellor, but the Injunction in that case was granted afterwards by the Master of the Rolls, the defendants, though served with notice, not appearing.

[l] Crockford v. Alexander, 15 Ves. p. 138; and see also Mitchell v. Dors, 6 Ves. 147. Hanson v. Gardiner, 7 Ves. 308. Courthope and Mapplesden, 10 Ves. 290. but in some of these cases the Chancellor seemed not very clear, whether an Injunction should be granted in a case of mere Trespass: but see Twort v. Twort, 16 Ves. 130. and Smith and Collyer, 18 Ves. 90. Earl Cowper v. Baker, 17 Ves. 128. and Thomas v. Oakley, 18 Ves. 184.

Manor has a right to open Mines on the Copyhold Land [m]. It has been held that the Lord of a Manor is confined to his legal remedy for Waste committed by a Copyholder, and has no Equity for an Injunction [n].

A case has been noticed, where a Tenant *for Life* may obtain an Injunction against Waste. So where *A.* is tenant for years, remainder to *B.* for Life, Remainder to *C.* in fee, and *A.* is doing Waste; *B.* though he cannot, not having the Inheritance, bring an *Action* for Waste, is entitled to an Injunction [o]. But if the Waste be of a trivial nature, and *à fortiori*, if it be what is termed *meliorating Waste*, as by building on the Premises [p], the Court will not enjoin; nor will it, in any case, unless the Reversioner or Remainder-man in fee, be made a Party; for they, possibly, may approve of the Waste [q].

So, an Injunction between Tenants in Common against malicious *Destruction* may be obtained, but not against what is called *equitable Waste* [r]; unless the Tenant in committing the Waste is insolvent [s]; but a *Tenant in Common* may obtain an Injunction inhibiting Waste, against another Tenant in Common, who is *occupying Tenant* to

[m] Grey v. Duke of Northumberland, 8 Ves. 236. S. C. 17 Ves. 281.

[n] Dench v. Bampton, 4 Ves. 700. but that case, it seems, was over-ruled in Richards and Noble, March 9th, 1807. MSS.

[o] Mollineux v. Powell, 3 P. Wms. 268, note F. 1 Roll Abr. Rosewell's case, 377.

[p] 1 Inst. 53.

[q] 3 P. Wms. 268. n. F.

[r] Hole v. Thomas, 7 Ves. 589.

[s] Smallman v. Onions and others, 3 Bro. 621.

the Plaintiff[s]; but except under such circumstances, an Injunction, it seems, cannot be obtained between Tenants in Common[t].

The Court, as hath been observed, interferes by way of Injunction in case of Waste, with a view to the *prevention of the Wrong;* and where a Bill is filed for an Injunction to stay Waste, and Waste has been already committed, the Court, to prevent multiplicity of Suits, will not oblige the Party to bring an Action at Law, but will decree an account and satisfaction for what is passed[u]: but after *the determination* of a Tenant's Estate, he having assigned, a Bill will not lie for an account of Timber cut down[v], no Injunction being prayed or necessary,—no injury to be prevented. If, indeed, a person commits Waste, and continues in Possession, there an Injunction to stay Waste is proper[w], from the probability that he will again commit Waste.

4. *The Sale of Books, Printed Music, or Prints*, will be restrained by Injunction, if a proper ground be laid for such Proceeding.

If, however, a Publication be of such a nature that the Author can maintain no Action at Law, a Court of Equity will not grant an Injunction even upon the submission in the answer: "the

[s] Twort v. Twort, 16 Ves. 132. S. C. MS.

[t] Goodwyn v. Spray, 2 Dick. 667.

[u] Jesus College v. Bloom, 3 Atk. 262,3. S. C. Ambl. 54.

[v] Ib. 264; and see Smith v. Cooke, 3 Atk. 381.

[w] 3 Atk. 381.

Court, for instance, will not," says *Lord Eldon*, "give an account of *the unhallowed profits of libellous Publications*[x]."

If the right to the Copyright depends *upon the effect of an Agreement*, the Court will not grant an Injunction against an invasion of the Copyright, until a recovery in an Action[y].

The Principle on which the Court grants Injunctions to restrain the Sale of Books, is, that damages do not give adequate relief, and that the Sale of Copies by the Defendant, is, in each instance, not only taking away the Profit upon the individual book, which the Plaintiff probably would have sold, but may injure him, to an incalculable extent, which no Inquiry for the purpose of damages can ascertain[z]. But wherever a fair doubt appears as to the Plaintiff's legal right, the Court always directs it to be tried, and only permits the Sale, on the Parties undertaking to account according to the result of the Action[a].

Where a Person was exclusively appointed by the House of Lords to print a Trial before that House, and another printed and sold the Trial, an Injunction to restrain the Sale, until answer, was granted[b].

The Proprietor of a copyright must file *separate*

[x] Walcott v. Walker, 7 Ves. p. 1.

[y] Ib.

[z] Hogg v. Kirby, 8 Ves. 225; and see Wilkins v. Aikin, 17 Ves. 424.

[a] See Wilkins v. Aikin, 17 Ves. 422.

[b] Gurney v. Longman, 13 Ves. 493. S. C. MS.

Bills against each Bookseller taking copies of a spurious Edition for Sale. If a Defendant transfers his Books to another, that person, it seems, may be made a Party [c].

Most of the Cases, where an Injunction has been sought to restrain the Sale of Books, have been where, under color of a new work, the old work has been republished, and copies multiplied; but an Injunction has, on the same principle, been applied to restrain the Sale of a Work, which, though not the same, *has been represented as the same* [d].

A Collection of *Letters*, as well as other Books, is within the intention of the 8th of Queen Anne, the Act for the Encouragement of Learning [e]; and an Injunction has been granted to restrain the Executor of the Person to whom private Letters were written, from publishing them without the leave of the Executors of the Person who wrote them [f].

It has been granted, also, to restrain the publication of Law *Precedents* and *Reports*, surreptitiously procured [g].

So, the publication of a Play taken in short hand from the mouth of the Performers, has been restrained [h].

[c] Dilly v. Doig, 2 Ves. jun. 486.

[d] 8 Ves. 215.

[e] Pope v. Curl, 2 Atk. 341.

[f] Thompson v. Stanhope, Ambl. 737. Earl of Granard v. Dunkin, 1 Ball and Beatty, 207.

[g] See Cases of Mr. Webb and Mr. Forrester, mentioned, Ambl. 694.

[h] Macklin against Richardson, Ambl. 694.

It is competent to any person to make a *Map*, a *Road Book*, a *Selection from Authors*, a *Court Calendar*, &c. such subjects being open to all the World; and in these cases, different persons might publish their collections, though the articles might happen to be the same; but a person will not be permitted to copy the original Work of another [i]. Nor is it allowable, under the *pretence* of *Quotation*, to publish either the whole or part of another's Work, though he may use, what it is in all cases very difficult to define, *fair Quotation* [k].

The invasion of another's Work is generally made evident to the Court by the similarity of the Inaccuracies [l], which could only proceed from unguarded plagiarism.

An *Abstract* [m], or *fair Abridgment* of a Work, is allowable [n]; but a *colorable Abridgment* is not [o].

In regard to *Engravings*, it has been determined, that, the Act (8 Geo. II. Ch. 13.) is not merely confined to works of *Invention*, but means the designing or engraving any thing that is already in nature [p]. It has been holden, also, that it is no answer to an application for an Injunction that the *Prints* are in any other work, unless

[i] See Longman v. Winchester, 16 Ves. 269; and see Matthews v. Stockdale, 12 Ves. 270: and Wilkins v. Aikin, 17 Ves. 425.

[k] Wilkins v. Aikin, 17 Ves. 424.

[l] Carnan against Bowles, 2 Bro. C. C. 84; but see Cary v. Faden, 5 Ves. 24.

[m] Dodsley against Kinnersley, Ambl. 403; and see Macklin against Richardson, Ambl. 696.

[n] Gyles v. Wilcox, 2 Atk. 143. S. C. Barn. 368. Bell against Walker, 1 Bro. C. C. 451.

[o] Butterworth v. Robinson, 5 Ves. 709. 2 Atk. 143.

[p] Blackwell v. Harper, 2 Atk. 92. S. C. Barn. 210.

they are represented in the *same manner* and *form*[q].

5. If *Negotiable Securities*, Notes, or Bills, are affected, by Fraud, and are, before they are due indorsed in a mercantile manner[a], the Indorsee, for the sake of commerce, will not be affected by the Fraud, and therefore the negotiation of them may be restrained, by Injunction, immediately on the filing of the Bill, supported by an affidavit of the truth of the fraudulent circumstances stated in the Bill, lest the defendant should upon intimation of the suit, by negotiating the Security, defeat its object[b]. A Bond or Covenant fraudulently obtained, though assigned to a third person for a valuable consideration, without notice, remains, nevertheless, impeachable for Fraud; for he has no remedy at Law, or right to sue in his own name, and has only an equitable remedy, which fails when the Bond is obtained by Fraud[c]: so that an Injunction to restrain an Assignment, is, in general, unnecessary.

A *Transfer of Stock* has in many instances been restrained; as where there are opposite claims under different Wills[d], and in other cases where Bills *Quia timet*, are filed, of which mention will presently be made. In one case, an Injunction was obtained to restrain a transfer of Stock standing in the name of a *Steward*, on strong evidence, by affidavit, that it was the produce of his master's

[q] 2 Atk. 95.
[a] Lex Prætoria, MS.
[b] See 1 Fonbl. Eq. 43 in note.
[c] Lex Prætoria, MS.
[d] 6 Ves. 172.

Property; but an Injunction was refused, as to Money of the Steward in the Banker's hands [e].

6. Injunctions to stay *Nuisances*, will, under circumstances be granted, but they will be extended only to such as are *Nuisances at Law:* the fears of mankind, though they may be reasonable ones, will not create a nuisance.

Nuisances are *private* or *public:* a Private Nuisance is that which affects only particular persons, as in stopping up ancient lights, &c.; a *Public Nuisance* is such as affects many persons, though, at the same time, it may likewise be of a private nature too, as in the case of a hole in the King's Highway, &c.

In the case of Public Nuisances, an Information should be filed in the name of the Attorney General [f]; and it is for his consideration, whether he will file it or not [g].

A Nuisance respecting lights is not such merely because the Plaintiff's lights are altered; for then no vacant piece of ground could be built upon in London, but the Law says it must be so near as to be a nuisance. Seventeen feet distance, for instance, will not constitute such nuisance. The loss of a Prospect is not considered as a nuisance [h].

An Injunction will not, on motion, be granted

[e] Lord Chedworth v. Edwards, 8 Ves. p. 46.; but in a subsequent case, MS. Lord Eldon said he had consulted with Lord Ellenborough, and thought he had gone too far.

[f] Anon. 753. S. C. See Barnes v. Baker, Ambl. 158.

[g] Ib. 159.

[h] Fishmongers Company against East India House, 1 Dick. 165.

to pull down blinds obstructing the Plaintiff's lights, no order ever being made, on *motion*, to pull down any thing, though it is sometimes, and but rarely, done on a decree; but the Chancellor will, by consent, put the matter in a way of Trial at Law, and order the scaffolding to be pulled down, and enjoin the party from building or erecting, whereby any of the Plaintiff's Lights may be obstructed, till after Trial had [i].

7. *Miscellaneous Cases in which an Injunction has been granted.*

Where the Defendant had a piece of Water supplied by the same Stream from which a Mill of the Plaintiff's was supplied, and the Defendant sometimes kept back the Water, and at other times let it in, in such quantities that the Mill was overflowed; on a Bill filed for the purpose, an Injunction was granted to restrain the Defendant from preventing it flowing in regular quantities [k]. It seems, that the Court cannot decree or order *repairs* to be done, though (a nice distinction,) an order may be made in terms that will have that effect. Thus an order to repair the Banks of a Canal, and stop Gates and other Works, was refused; but the effect of such an order was obtained, by an order to restrain the Defendant from farther impeding the Plaintiff in the Navigation,

[i] Ryder v. Bentham, 1 Ves. 543. S. C. 1 Dick. 277. where the order is more particularly stated, and see Morris v. Lessees of Lord Berkley, 2 Ves. 452.

[k] 1 Ch. Ca. 574. See also Robinson v. Lord Byron, 1 Bro. C. C. 588.

"by continuing to keep the said Canals, or the Banks, Gates, Locks, or works of the same respectively out of good repair [l]." A Tenant *for Life*, however, has been compelled to *repair* [m]. The Court will grant an Injunction where there has been a forcible Entry by Commissioners of the Turnpike, for the purpose of digging Gravel on Land leased to the Plaintiff for twenty-one years and turned into a Garden [n]. And so, too, it seems, according to the reasoning of *Lord Hardwicke*, an Injunction lies in the case of private persons entering by force into ground, of which another has had possession for twenty-one years, though in such case there is a Remedy at Law; "but that" (says his Lordship,) "would be only for a particular wrong done, and not equal to the Remedy in Chancery [o]."

An Injunction will be granted to protect the enjoyment of a specific Chattel not properly the subject of Compensation in damages [p]. It will be granted, also, to prevent the destruction of personal Property, not properly the subject of Compensation, until the rights respecting it are

[l] Lane v. Newdigate, 10 Ves. 194.

[m] Prac. Chan. p. 260. In Birch v. Holt, 3 Atk. 725. a motion was made in the nature of an Injunction, or rather for leave to put a Mill-dam into the same situation it was in before it was cut down: Lord Hardwicke said he had known numbers of applications of the kind, "but while the right is unheard and undetermined, the Court have as constantly denied the motion."

[n] Hughes v. Trustees of Morden College, 1 Ves. 188.

[o] Hughes v. Trustees of Morden College, 1 Ves. Sen. 189.

[p] Lady Arundell v. Phipps, 10 Ves. 139.

ascertained, upon the principle of preventing irreparable mischief [q].

There are various other occasions where an Injunction will be granted, but which are difficult to state, otherwise than in detached Propositions.

If a Decree is made in execution of a Trust, and a Defendant thereto attempts to controvert that at Law, the Court will grant an Injunction [r].

So, if a Bankrupt bring an action against his Assignees, the Court will grant an Injunction until the hearing [s].

An Injunction may be maintained, in many cases, to prevent an Executor from getting assets of a Testator into his Hands, upon particular circumstances [t].

A Wife, for instance, an Executrix, has been restrained from getting in the assets of the Testator, her Husband being in the West Indies, and not amenable to the process of the Court [u].

But the Court will not interfere by Injunction, merely because the Executor is not in affluent circumstances, if the Testator himself has placed this confidence in him, without regarding his circumstances [v].

On a Bill by Creditors against the Executor, Heir, and Purchaser, of a Real Estate charged for payment of debts, an Injunction may be obtained

[q] Nubbrowne v. Thornton, 10 Ves. 163.
[r] Flower v. Herbert, 2 Ves. 327.
[s] Ib. 326. etc.
[t] Taylor v. Allen, 2 Atk. 213.
[u] Ib.
[v] Hathornwaite v. Russell, 2 Atk. 126. S. C. Barn. 334.

to restrain the payment of the purchase Money to the Heir [w].

In the Case of Agreements on Sales, and Deposits made, if the Agreement is not performed by the time stipulated, the Purchaser may bring an Action for his Deposit; but a Bill may be filed against him praying a specific Performance, and an Injunction in the mean time. An Injunction, also, may be obtained on Certificate of the Bill filed and Affidavit, against a surviving Partner, to restrain him from disposing of the joint Stock, and receiving the outstanding debts, he being embarrassed and in prison, and misapplying the Property [x].

If a Lord of a Manor has approved under the Statute, and left sufficient Common of Pasture, and the Inclosures are thrown down by the Tenants, an Injunction may be obtained, and at the hearing, an Issue will be directed, as to the rights of the Parties [y].

An Injunction lies to restrain the injuring of *Fish-ponds* [z].

An Injunction against the Use of a Market will not be granted, at least, until a Title at Law is established [a].

If an *Ejectment* be brought against a *Tenant*, who makes default at the Trial, and employs the interval in doing all the mischief in his Power,

[w] Green against Lowes, 3 Bro. C. C. 218.

[x] Harty v. Schrader, 8 Ves. 318; and see on this subject Read v. Bowers, 4 Bro. C. C. 441.

[y] Weeks v. Staker, 2 Vern. 300. Arthington v. Fawkes, 2 Vern. 356. Hanson v. Gardiner, 7 Ves. 309.

[z] Earl Bathurst against Burden, 2 Bro. C. C. 64.

[a] Anon, 2 Ves. 414.

an Injunction will be granted [b]; but unless an *Ejectment* be brought, an Injunction will not lie against a Tenant so misbehaving himself [c].

Courts of Equity interfere, in many cases, to restrain a *Breach of Covenant* [d]: as where a Tenant is carrying off a Farm, Manure, &c. he had covenanted to consume upon it; but where a covenant is of such a description, that a breach of it can only be ascertained, in each instance, by a Trial, the Court will not interfere [e]. An Injunction has been granted to restrain a Tenant of a Farm, from breaking up Meadow for the purpose of building, contrary to express Covenant [f].

On the same Principles, an Injunction has been granted to restrain a Tenant from year to year under notice to quit, as in the case of a Lessee for a longer term, from doing damage, and from removing the Crops, Manure, &c. except according to the custom of the Country [g].

The Court with reluctance grants an Injunction to stay the working a Colliery, unless there is a breach of an express Covenant, or an uncontroverted mischief [h].

Where there is an *Agreement* for a Lease of a Farm, and the intended Lessee is in possession, and uses it, "*in a grossly unhusbandlike* manner," and there would be a right of re-entry in

[b] Sir Wm. Pulteney v. Shelton, 5 Ves. 260. in note.

[c] Lathrop v. Marsh, 5 Ves. 259.

[d] Barret v. Blagrave, 5 Ves. 555.

[e] See Collins and Plumb, 16 Ves. 454.

[f] Lord Grey de Wilton v. Saxon, 6 Ves. 106.

[g] Onslow v. ——, 16 Ves. 173.
Anon. Ambl. 209.

the Lease, when executed; an Injunction will lie, but will not be continued, with a view to a specific performance[i].

It seems, that even if no right of Entry was to be introduced, under an Agreement for a Lease of a Farm, yet the Court seeing a gross case of Waste, (which will in all cases be a Forfeiture of the place wasted,) and gross breaches of Covenant, that could not well be indemnified by damages, would interfere by Injunction[k].

If a Person sells the *Good Will* of a Trade, and afterwards attempts to set up the same Trade, in the same place, under the same sign or name, the party giving himself out as the same person, an Injunction, it seems, may be obtained[a].

An Injunction will not lie to restrain one Trader from making use of *the same mark* with another[b].

Perpetual Injunctions are granted on many occasions; against a Bond, for instance, for the purchase of an office, although the office was not within the stat. 5 and 6 Edw. 6[c]. And such Injunction lies against a Bond of Resignation, the Patron making an ill use of it, to prevent the Incumbent from demanding Tythes[d]. Such an Injunction, also, has been awarded, against proving a Will in

[i] Gourlay v. Duke of Somerset, 18 Ves. 72.

[k] Ib. 73.

[a] See Cruttwell v. Lye, 17 Ves. 342.

[b] Blanchard v. Hill, 2 Atk. 484.

[c] Harrington against Du Chatel, 1 Bro. C. C. 124.

[d] Durston v. Sandys, 1 Vern. 411. S. C. 2 Ch. Cas. 186. S. C. 2 Ch. Rep. 398.

the Spiritual Court, which on a Trial at Law has been found to be no Will [e]. And these perpetual Injunctions remain notwithstanding the death of the Plaintiff; nor is it necessary for his Representative to file a Bill to continue the Injunction [f].

But, it seems, a Bill to establish a legal Title and a *perpetual Injunction* is never entertained by a Court of Equity, unless there are particular circumstances stated in the Bill, shewing the necessity of the Court's interposition, either for preventing multiplicity of Suits, or other vexation, or for preventing an injustice irremediable by a Court of Law [g].

Perpetual Injunctions, are, generally, the object for which, what are termed *Bills of Peace*, are instituted. The principles upon which these Bills are resorted to will now be considered.

6. *Bills of Peace.*

Bills of Peace are made use of where a Person has a Right which may be controverted by various persons, at different times, and by different Actions; and the Court will, thereupon, prevent a multiplicity of Suits [h], by directing an Issue to determine the Right, and ultimately an Injunction. Another occasion where a Bill of this kind is resorted to, is, where there have been repeated

[e] Beversham v. Thringhold, 1 Ch. Cas. 80.

[f] Vid. the case mentioned in Morgan v Scudamore, 2 Ves. Jun. 36.

[g] See Arg. in William Welby, esq. App. and Duke of Rutland, Resp. 6 Bro. Ca. P. 575.

[h] See Baker v. Shelbury, 1 Ch. Ca. 70.

attempts to litigate the same question, and repeated and satisfactory Trials; in which cases, the Court upon such a Bill, preferred by all the Parties interested, or by some of them in the names of themselves, and the rest, will grant a perpetual Injunction to restrain further litigation [h].

Bills of this kind are frequent in disputes between Lords of Manors and their Tenants, and between Tenants of one Manor and another; for in these Cases there would be no end of bringing Actions of Trespass, since each Action would determine only the particular right in question, between the Plaintiff and Defendants [i].

So, where a *Right of Fishing* upon the River *Ouse*, for nine Miles in extent, was claimed by the Corporation of York, who had constantly exercised that right, but which was opposed *by different* Lords of Manors, a Bill of this description was admitted, to establish the Right against these several opponents, for it would have been endless for the Corporation to have brought Actions at Law [k]. In this case, it is observable that whilst the Suit was pending, the Plaintiffs caused the Agent of the Defendant to be *indicted* for a Breach of the Peace in fishing in their Liberty; and upon a motion made before *Lord Hardwicke* to stop

[h] See Lord Bath v. Sherwin, Precedents in Ch. p. 262. Finche's Edit. and see 2 vol. of Schoal and Lef. p. 208. and the cases there mentioned.

[i] Lord Tenham v. Herbert, 2 Atk. 483; and see Hanson v. Gardiner, 7 Ves. 310.

[k] Mayor of York v. Pilkington, 1 vol. Atk. 282; and see Lord Tenham v. Herbert, 2 Atk. 483.

the Prosecution, he observed, "This Court has not originally, and strictly, any restraining power over Criminal prosecutions; and in this case, if the Defendant had applied to the Attorney General, he would have granted a *noli prosequi*.

"For when a complaint is grounded on a Civil Right, for which an Action of Trespass would lie, the Attorney General of course grants a *noli prosequi*.

"If Actions of Trespass had been brought *vi et Armis*, this Court would have stopped them; *but though I cannot grant an Injunction, yet I may certainly make an order upon the Prosecutors to prevent the proceeding on the Indictment.*

"Supposing it was a Suit for a right of Land where entries had been made, and the Bill was brought to quiet the possession, and after that they prefer an Indictment for a forcible entry, which is of a double nature, as it partakes of a Breach of the Peace, and is also a Civil right, this Court would certainly stop the proceedings upon such indictment."

"Where Parties submit their right to the Court, they have certainly a Jurisdiction, and may interpose. Therefore I will make an order to restrain the Plaintiffs from proceeding at the Sessions, till the hearing of the Cause and further order[l]."

Such a Bill may be brought as well by Tenants against a Lord, as by a Lord against Tenants[m]; as,

[l] 2 Vol. Atk. Reports, p. 302. Mayor, &c. of York v. Pilkington.

[m] Conyers v. Lord Abergavenny, 1 vol. Atk. 285.

for instance, to settle a *general fine*, to be paid by all the Copyhold Tenants of a Manor[n].

Such a Bill has been entertained *at the instance of the New River Company*, to quiet them in the possession of Pipes laid through the Defendant's Field[o]: and respecting Suit to a Mill[p]: or, where several Tenants claim a right to the *Profits of a Fair*[q]. So, on a Bill shewing that one Commoner had recovered one shilling, or other small damages against the Plaintiff for oppressing the Common, or for using the Common where he ought not, and praying that the Defendant, another Commoner, might accept of like damages for what was past, to prevent charges at Law, the *Lord Keeper Guildford* said, it was in the *nature of a Bill of Peace*, and *was proper*[r]. There are Cases where Bills of Peace have been brought, though there has been a general right claimed by the Plaintiff, and yet no privity between the Plaintiffs and Defendants, nor any general right on the part of the Defendants, and where many more might be concerned than those brought before the Court. Such are Bills for Duties; as, in the Case of the City of *London* v. *Perkins* in the House of Lords, where the City of London brought only a few persons before the Court, who dealt in those things whereof the duty was claimed, to establish a right to it; but because a great number of Actions may be brought, the Court

[n] Cowper v. Clerk, 3 P. Wms. 156. see Bunb. 41.

[o] 2 Vern. 431. New River Comp. v. Graves.

[p] Sir Lionel Pilkington's Case in the Duchy Court, cited, 1 Bro. 40.

[q] Meureit v. Eastwicke, 1 Vern. 266. 1 vol. Eq. Cas. Abr. p. 79. pl. 2.

[r] Pawlet v. Ingrey, 1 Vern. 308, 1 vol. Eq. Cas. Abr. p. 79. pl. 2.

suffer such Bills, though the Defendants might make distinct defences, and though there was no privity between them and the City[r].

It has been determined, however, that a Bill of Peace will *not* lie *between two Parishes* to have an Issue to ascertain the boundaries of each[s]. "It would be," said *Lord Thurlow*, "to try the Boundaries of all the Parishes in the Kingdom on Account of the Poor Laws." He apprehended these Issues had usually been directed by consent of the Parties[t]. It seems, too, that the Court on a Bill of this nature will not decree a perpetual Injunction for the enjoyment of, nor establish, the right of a Party who claims in contradiction to a public right, as a right to a Highway, or a common Navigable River; for that would be to enjoin all the People of England[v]. Where, therefore, a Bill was brought to be quieted in the possession of an Ancient *Ferry*, used with a Rope over the River *Ware*, against *twenty* Defendants who had cut the Rope, with a view, as it was insisted, to avoid multiplicity of Actions, the Chancellor observed, "Plaintiff may have trespass for cutting the Rope: a Ferry is in nature of an Highway; and a Bill does not lie to be quieted in the possession of an Highway. A Bill lies to be quieted in the possession of a Common; but that is of a different nature: this is a Navigable River, and the Rope

[r] Harrison's Ch. 1 vol. p. 127.

[s] Parish of St. Luke, Old Street, against the Parish of St. Leonard, Shoreditch, 1 Bro. 40.

[t] Id. ibid.

[v] Mitford's Pleadings, 129.

to the Ferry is an obstruction of the Navigation: if Plaintiff has any such right there is proper remedy for him at Law [w]."

Nor can a Bill of this description be maintained, where a right is disputed between *two persons only* [x]. As where a Bill was brought by *one Tenant* of a Manor, suggesting a custom for the Tenants of the Manor of A. (of which he was one) to cut Turves in the Manor of B. to quiet him, and to have an Issue directed as to the right; upon this occasion, the Court said, "This Bill is improper, and inconsistent with the nature and end of a Bill of Peace, which is, that *where several persons having* the same right are disturbed, as application to the Court to prevent expence and multiplicity of Suits, issues will be directed, and one or two determinations will establish the right of all parties concerned, on the foot of one common Interest, and the Bill is preferred by all the parties interested, or a determinate number in the name of

[w] Harrison's Ch. 1 vol. p. 125.

[x] Lord Tenham v. Herbert, 2 Atk. 483. and Whitchurch v. Hide, 391. see also 4 Bro. P. C. 157. Vin. tit. Ch. 425. pl. 35; see also Cowper and Clerke, 3 P. Wms. 156. "According to this distinction," says Lord Chancellor King, "are the Cases, 1 Ch. Rep. 33. and 96;" see also Fortescue, p. 42. and 44. and the Case of Webb and Conyers, cited, 1 Bro. 40. Welby and the Duke of Rutland, 6 Bro. P. C. 575. in which Case, as Lord Thurlow observes in Weller and Smeaton, 1 Bro. 573. "most of the Cases on the subject had been looked into, and it was found that in no instance, except that of Bush and Western, Prec. Ch. 530. had this Court ever interfered in a mere question of right between A. and B. they having an immediate opportunity of trying the right at Law which would be definitive." The same Case is shortly noticed in 2 Dick. Rep. 442; and see S. C. cited, 2 vol. Schoales and L. p. 209; see on this subject, Finch v. Resbridge, 2 Vern. 390. and the note.

themselves and the rest; but in this case one only brings the Bill on the general right, and not on the foot of any particular distinct right, and therefore the Bill was dismissed with costs [y].

A Bill of this kind should not merely pray Special Relief, as that the Plaintiff may be quieted in the possession till the right is tried at Law; but should also pray *relief* in the Premises, or a perpetual Injunction: and in a case where it was deficient in that respect, the Bill when it came to an hearing was directed to be amended in that particular [z].

After *five* Trials in Ejectment, and Verdicts in all of them, for *the Earl of Bath*, he brought a Bill of this kind for a perpetual Injunction, and though *Lord Cowper* refused to grant it, yet the *House of Lords* on appeal granted the Injunction [a]. After even *two* satisfactory Trials of an Issue *Devisavit vel non*, the Court, it seems, will interpose to prevent any farther Trial [b], especially if they were Trials at *Bar* [c].

If a Trust Estate be devised to be sold, and a Bill is brought against the Trustees to oblige them to sell, and the Heir contests the Will, after *two*

[y] Harrison's Ch. vol. 1. p. 124.

[z] Ewelme Hospital v. Andover, 1 Vern. 266.

[a] Lord Bath v. Sherwin, Prec. Ch. 261. and S. C. as it seems, in Lucas's Rep. p. 1. and 1 Bro. P. C. 266. on the appeal. See also S. C. noticed in Leighton and Leighton, 1 P. Wms. 672.

[b] Bates v. Graves, 2 Ves. Jun. 293.

[c] See 1 P. Wms. 671. S. C. 1 Str. 404. and 2 Bro. P. C. 217. Coker v. Farewell, 2 P. Wms. 563.

Trials the Court will grant a *perpetual Injunction* [e].

It appears that the *Lord Keeper Guildford* was of opinion that if the matter before him had been *res integra*, he should not have made altogether such a decree as *Lord Clarendon* had, whereby the *Inheritance* was bound after *one* Trial [f].

If the Court cannot fix upon an *Issue* that will comprehend all the subject in dispute, it will not, it seems, interfere on a Bill of this kind, but leave the Party to his remedy at Common Law [g].

7. *Bills of Interpleader.*

A *Bill of Interpleader*, (similar in some measure to the doctrine of Interpleading at Law, in cases of *Bailment* [h],) is resorted to, where a person claiming no right in the subject, and not knowing to whom he ought of right to render a Debt or Duty, apprehends injury from claims made, (a mere *claim* is a ground of *Interpleader*,) by two or more claiming in different or separate Interests, the same Debt or the same Duty [i]. The Bill states the situation of the Plaintiff, the conflicting claims upon him, and prays that such claimants may *interplead*, so that the Court may adjudge to whom the Debt or Duty belongs, and that the

[e] Leighton v. Sir Edward Leighton, 1 P. Wms. 671.

[f] Fitton v. Macclesfield, 1 Vern. 292.

[g] Lowther v. Ray et al. Trin. 8 Geo. II. 1735. MS.

[h] Langston v. Boylston, 2 Ves. 109.

[i] Dungey v. Angove, 2 Ves. Jun. 310.

Plaintiff may be thereby indemnified. The Plaintiff should also by his Bill, offer to bring the Money (if any be due) or Property claimed into Court; and if such offer is not made by the Bill, the Court, upon the application of either of the Defendants, will order the Plaintiff to bring such Property, or pay the Money into Court, or into the Bank, in the name of the Accountant General, in trust in the cause, for the benefit of the party to whom the Court at the hearing of the Cause should decree the same to belong [k]. If the Defendants have commenced Actions at Law, (unless they are Ejectments [l],) or Suits in Equity, an Injunction must be prayed in the usual form [m], to restrain the claimants from proceeding till the right is determined. And in support of the motion for an Injunction, an Affidavit of the facts may be read [n]. But, it seems, the Plaintiff never can proceed compulsorily, by Injunction, till he has brought the Money into Court [o], though there are some cases that point to a contrary doctrine [p]. In the *Exchequer*, when the Plaintiff produces a certificate of the Deputy Register that the Money

[k] In Thanet v. Patterson, Barnard, 247. the Bill was held not to be an Interpleading Bill, because it did not contain an offer to bring the Money into Court; see 2 Ves. Jun. 109. Langston v. Boylston. In strictness perhaps it is ground of Demurrer, Mit. Tr. p. 126.

[l] 2 Anstr. 531. in note, and 3 Anstr. 798.

[m] 2 Ves. Jun. 101. Langston v. Boylston, 3 Bro. 36. Dungey against Angove.

[n] 2 Ves. Jun. 101. Langston v. Boylston, 3 Bro. 36. Dungey against Angove and others.

[o] Prac. Reg. last edition, 78.

[p] See the Cases cited in Mr. Hollist's Arg. 3 Bro. 36. Dungey v. Angove and others.

is paid into Court, it is a Motion of course to grant the Injunction[s].

Such a Bill for a sum under £10. has in the Exchequer, been dismissed as being beneath the dignity of the Court[t].

There must be annexed to the Bill, or upon the filing of it, there must be made[v], an Affidavit by the Plaintiff, that he doth not exhibit his Bill by *Fraud or Collusion* with the claimants, but *spontaneously* for his own security ; but he need not swear that the Bill is filed at his *own expence*[x]. If no such Affidavit is made, the neglect, in strictness, affords ground for a Demurrer[y]. The more usual way is to annex the Affidavit to the Bill. If the Affidavit is false, the Party is liable to a Prosecution ; but the Court will not determine it to be false upon a Counter Affidavit[z]; but if there be a suspicion of collusion, the Court will direct an inquiry into the circumstances : and in a case in which a Report confirmed the fraud, the Bill was dismissed with Costs to the Landlord, as between Attorney and Client, to be paid by the *Plaintiff and his Solicitor*, and the latter was ordered to shew cause why he should not be struck off the Roll[a].

It must appear by the Bill that there is some

[s] 1 Fowler's Prac. 296.

[t] 2 Anst. 530.

[v] To such a Bill against the Attorney General and others, there must be an affidavit annexed, Bunb. 303.

[x] 1 Ves. Jun. 248. Metcalf v. Harvey.

[y] Mit. Tr. 126.

[z] 2 Ves. Jun. 310. Dungey v. Angove.

[a] 2 Ves. Jun. 304. Dungey v. Angove.

person capable of interpleading, and it must shew that there is such a person in *rerum naturâ* as can interplead[b]. It must also shew, that each of the Defendants whom it seeks to compel to interplead, claims a right, otherwise both the Defendants may demur: the one, because the Plaintiff shews no claim of right in *him;* the other, because the Bill shewing no claim of right in the *Co-Defendant*, shews no cause of Interpleader[c]. If the Plaintiff shews no right to compel the Defendants to interplead, whatever rights they may claim each Defendant may demur[d].

Such Bill lies where the Tenant may be liable to pay his Rent to one of two different persons claiming the same Rent, in privity of Tenure and privity of Contract, as in the Case of Mortgagor and Mortgagee, Trustee and Cestui que Trust, or where the Estate is settled to the use of a Married Woman, of which the Tenant has notice, and the Husband has been in the receipt of the Rent, and differences arise between them, and she claims the Rent.

There may be a variety of Cases in which the Tenant, not disputing the Title of the Landlord, but affirming that Title, the Tenure and the Contract, by which the Rent is payable, but where it is uncertain to whom it is to be paid, may file a Bill of Interpleader[e]. But a Tenant cannot file a Bill of Interpleader against his Landlord, on

[b] 1 Ves. Sen. 248. Metcalf v. Hervey.
[c] Mitford's Treatise, p. 126.
[d] Ib.
[e] 2 Ves. Jun. 312. Dungey v. Angove.

notice of an Ejectment by a *stranger*, under a title adverse to that of the Landlord[f]. But this Rule does not hold, where the question arises upon the act of the Landlord *subsequent* to the Lease[g]. As where a Lessee of Tithes filed such a Bill against the Lessor, the Vicar, and the Assignees under an Insolvent Act of which he took the benefit *subsequent* to the Lease; each of them claiming the Rent; and the Court thereupon directed an Action to be brought by the Assignees, and to be defended by the Vicar[h]. So, in *Lord Thomond's Case*, a Bill of Interpleader was filed by Tenants, against their Landlord, and persons claiming Annuities *subsequent* to the Lease, and the Bill was sanctioned by *Sir Thomas Sewell*, the Tenant being by the Act of the Lessor entangled in a question which he could never settle[i]. If a Guardian having an Infant in his custody, conceals and will not produce him, but sets up a Title to himself, and the Plaintiff suggests by his Bill, that the Infant has a right to controvert that Title, "in such a Case and so charged," says *Lord Hardwicke*, "I will not say but such a Bill might be brought to compel the Guardian to produce him[k]."

If one who is not a party to a Suit, supposes he has a separate Interest in the matter in question, and commences his Suit against the De-

[f] Ibid. See also Clarke v. Byne, 13 Ves. p. 386.

[g] 9 Ves. 107. Cowtan v. Williams, see also Clarke v. Byne, 13 Ves. p. 385.

[h] 9 Ves. 107. Cowtan v. Williams.

[i] Ib.

[k] 1 Ves. Sen. 249. Metcalf v. Hervey.

fendant, praying to be relieved according to his right, the Plaintiff in the first Suit may make the Plaintiff in the second Suit a Defendant, in order to interplead, and contest the right[l]. A mere *stake-holder* may file such a Bill [m], and so may Agents for Captures[n].

Where several Bills are brought *by the same Person* and for the *same* thing, or in Case of an Infant, where several Bills are brought, by several *prochein Amys* for the same thing, the Court will, on motion, stay the proceedings in all but one Suit; but the Court will not interfere thus arbitrarily, except in these Cases; for, says *Lord Hardwicke*, every person in a free Country, as this is, has a right to bring his Suit and be heard[o]: and, accordingly, he would not stay proceedings in a Case where two Bills had been filed for the same purpose against the Defendant, the one by the party interested himself in a Co-partnership Account, and the other by an Assignee of that Plaintiff, though there were great marks of its being a contrivance [p].

A Bill, praying that a Modus of £7. might be established, and that the Rector of Market Bosworth, and Rector of Sibson might interplead as to the Tythes to be covered by the Modus, was dismissed [q].

[l] Prec. Reg. p. 78. last Edition.

[m] 6 Ves. 418. Aldridge v. Mesner.

[n] See 9 Ves. 73. Suttons v. Earl of Scarborough, where in the Pleadings, such a Bill is stated to have been brought, and an Issue directed.

[o] Ambler 103. Gage against Bulkely.

[p] Ib.

[q] 3 Anstr. 801. Woolaston and others v. Wright.

If on a Bill of Interpleader, a Trial at Law is directed between the Defendants, the Suit is thereby ended as to the Plaintiff; and if the Plaintiff dies, the Defendants may still proceed without reviving the cause[r].

If an Interpleading Bill is properly instituted, the Plaintiff is entitled to his Costs, out of the Fund in Court[s]; and if there be no fund in Court, the Costs will be given against the Party who occasioned the Bill[t]. Costs may be given *as between the Defendants* to an Interpleading Bill[v]. Justice requires this, and it has been done in a variety of Cases; the decision to the contrary, of *Dowson and Hardcastle*[w], not having been followed.

It is very obvious that Bills of Interpleader may on many occasions be advantageously resorted to; but the Court does not look very favourably upon them, and *Lord Hardwicke* expressed himself unwilling to allow *new inventions*, in the bringing of such Bills[x].

8. *Bills of Certiorari.*

A Special Writ of Certiorari is frequently prayed for in a Bill filed by a *Defendant*[a], in a suit in an inferior Court of Equity, having limited Jurisdiction, such as the *Courts of Equity in Counties*

[r] 1 Vern. 352. last edition, Anonymous.

[s] 2 Bro. 149. Aldrich against Thompson.

[t] 6 Ves. 419. Aldridge v. Mesner.

[v] 9 Ves. 108. Cowtan v. Williams, and the case in note.

[w] 1 Ves. Jun. 368.

[x] Metcalf v. Harvey, 1 Ves. 249.

[a] Such a Bill cannot be filed by the Plaintiff, in the inferior Court, Jacob's Ch. Prac. 1 vol. 680.

Palatine [b], the *Courts of Great Sessions in Wales* [c], the Courts of the two *Universities* of *Oxford and Cambridge*, and the *Courts of the City of London*, and the *Cinque Ports*, to remove a Cause into the Court of Chancery, upon a suggestion, either that the cause is out of the Jurisdiction of the Inferior Court, or that the Defendants, or the Witnesses, live out of its Jurisdiction, and are not able, owing to Age or Infirmities, or the distance at which they live, to attend such Inferior Court, or cannot be compelled by the process of such Court to be examined there, and that for these or other reasons, assigned in the Bill, equal justice is not likely to be obtained in such Court.

This Bill does not pray that the Defendant may Answer, or even appear to the Bill, and consequently it prays no Writ of Subpœna [d].

When the Party has filed his Certiorari Bill, on Motion, and a Certificate from the Six Clerk that the Bill is filed, the Certiorari Writ prayed for by it will be granted by the Lord Chancellor, and is usually directed to the Judge of the Inferior Court, requiring him to certify or send to the Court the Tenor of the Bill or Plaint there with the process and proceedings thereupon. When the Order is passed and entered, the Clerk in Court procures the Writ, and upon the making out and receipt of it, a Bond is entered into,

[b] 1 Ch. Ca. 31.
[c] Dougl. 5. note 2.
[d] Mitford's Pleadings, p. 49. According to some Precedents a Subpœna *is* prayed; see 2 vol. Jacob's Chancery Prac. 683.

before the Register, by the Plaintiff in the Certiorari Bill, together with a surety, to the Master of the Rolls, in a penalty of £100, conditioned that the Plaintiff shall prove the suggestion of his Bill in fourteen days after the return of the Writ, which is returnable within fourteen days after its being served on the Defendant. Upon the Writ of Certiorari being served and returned, a motion is made to file the Writ, which will thereupon be ordered to be filed, together with the proceedings removed. If it appears by the *Plaintiff's own shewing in the Bill filed by him* in the Inferior Court, that he lives out of the Jurisdiction of such Court, then the Plaintiff in the Certiorari Bill, without proving any allegation in his Bill, may obtain an order on Motion or Petition to retain the Bill removed; after which the Defendant must put in an answer as if the cause had been originally instituted in the Court in which the Bill of Certiorari is exhibited.

When Interrogatories to prove the suggestions of the Certiorari Bill are necessary, they must be filed with the Examiner, and Witnesses examined by the Plaintiff, and by him only, for the Defendant is not permitted to examine or to publish any thing to disprove their Testimony. An order must be procured by Motion or Petition to refer such examination to a Master, and for the Examiner to attend with the depositions. The Master's report must then be obtained; and if he certifies the suggestions of the Bill to be proved,

the Court may be moved upon such report, to have the Bill retained. If the suggestions in the Bill cannot, from circumstances, such as the remoteness of the Witnesses or other good cause, be proved within the fourteen days, further time to make such proofs may be obtained on a Motion or a Petition supported by an Affidavit of the Circumstances.

The Proofs on this occasion, are not afterwards made use of upon the hearing of the removed cause; but the Parties after such removal, proceed, in the ordinary course, and to the examination of witnesses, if necessary: for the proofs in the *Certiorari Bill*, are only for the purpose of giving the Court Jurisdiction.

If the suggestions of the Certiorari Bill are not proved, a *Procedendo* may be applied for, and obtained, which is a Writ directed to the Judge of the Inferior Court, requiring him to proceed in a Cause, which is removed into a Court of Equity, by Certiorari, &c. the Plaintiff, in the *Certiorari Bill*, not having sufficiently proved the suggestions in such Bill.

In upon a *Certiorari Bill* the cause is brought on to a hearing, the Court, if they think fit, may make a Decree, or send it back to the Inferior Court to be determined; and sometimes the Court sends it back after publication passed, and a Subpœna served, to hear Judgment, and before the hearing[e].

[e] Stephenson v. Houlditch, 2 Vern. 491.

9. *Bills to perpetuate Testimony.*

The very title of this Bill, explains it use. The *Lord Keeper Egerton* expressed his dislike of these Bills, because, the Depositions are not *ordinarily* published, but upon oath, that the witnesses are dead, so that the Witness is not affected by the fear of temporal punishment. Indeed, *Lord Chancellor Parker* thought such Evidence could not amount to Perjury at Law, no Issue being joined [f].

The Bill sets forth the Plaintiff's Title to the thing in question, or Interest in the subject, the Matter touching which the Plaintiff is desirous of acquiring evidence, the Interest in the Defendant, to contest the Title of the Plaintiff in the subject of the proposed testimony, that the witnesses are old and infirm, or sick, and not likely to live, or that they are going to Sea [g], or are beyond Sea [h], or that the facts to be examined to, are of great importance, and no other but the Witness [i], or *two* Witnesses [k] to be examined, is, or are privy to them, whereby the Plaintiff is in danger of losing his Testimony. The Bill ought also to state, that the facts about which the Wit-

[f] Cann v. Cann, 1 P. Wms. 569; and see what is said by C. Bar. Parker, 2 Eq. Abr. 402.

[g] The plaintiff will not be allowed to examine witnesses de bene esse, because they are going to the East Indies, if they are his servants, and he might keep them at home, Bunb. 320. Com. Dig. Tit. Chancery R.

[h] See what Lord Mansfield says in Fabrigas and Moystyn, 11 vol. State Trials, p. 196.

[i] 3 P. Wms. 77. Shirley et al. v. Earl Ferrers, and the cases cited in note 1. See also Hawkins against Middleditch, 2 Bro. 641.

[k] Lord Cholmondeley against the Earl of Oxford, 4 Bro. 157.

nesses are to be examined cannot be immediately investigated in a Court of Law, or that before an investigation can take place, the evidence of a material witness is likely to be lost by his Death, or departure from the Realm[l]. A Commission is then prayed to examine them, to the intent, that their testimony may be preserved, and a Subpœna is also prayed to the parties interested, to shew cause, if they can, to the contrary; but the Bill should pray no other Relief. If the Defendant shews cause to the contrary within fourteen days, the Plaintiff is not allowed to proceed[m].

After the Bill is filed, the Court on an affidavit verifying the facts as stated in the Bill, and that the Witnesses are material, will on Motion or Petition, grant a Commission if the Witnesses live in the Country, or beyond Sea. If they reside within ten miles of London it will order them to be examined in Court, *de bene esse*, saving just exceptions to the other side, which will make their depositions valid in that cause only, and against those who are Parties to it, and all those claiming through some or one of them[n], whose interest has accrued, since the Bill was preferred; but the Depositions must not be taken *exparte*, *without notice*, otherwise they will be suppressed[o].

If the Defendant afterwards answers the Bill, the Plaintiff should reply, and examine *de novo*

[l] See as to this Mitford's Pleadings, p. 51.

[m] 2 vol. Com. Dig. 291. Cited Prac. Reg. 31.

[n] See the opinion of the Judges in the case of the Banbury Claim of Peerage, Dom. Proc. delivered on the 30th May, 1809.

[o] Lovedon against Milford, 4 Bro. C. C. 540.

the Witnesses before examined, who are alive, and upon the return of the Commission publication is made of the Depositions thereby taken, with the Depositions of the Witnesses before examined, who were dead before the second Commission [p].

Depositions may, by the *consent* of Parties, be published whilst the Witnesses are alive; but otherwise, depositions taken on these Bills are not, as before observed, ordinarily published, but upon oath, that the depositions of such Witnesses are necessary, and that they are either dead, and therefore incapable of being examined, *in chief*, (as they ought to be if possible) or so aged or incapable, that they cannot travel or testify, without danger to their lives [q], or that the Witness is gone to a great distance; or, in a word, that there is a *moral impossibility* to have an Examination in Chief [r].

Having stated the essential properties of a Bill of this nature, and the proceedings thereon, it may be proper to illustrate what has been said, by the mention of some cases on the subject; and first, *as to the title to the thing in question, or Interest in the Plaintiff necessary to support the Bill:* with respect to which, it has been decided, that neither a Tenant in Tail in Remainder, nor their Issue, can file such a Bill to perpetuate the Testimony to the Marriage of the Tenant in Tail, for

[p] Comyn's Digest, 2 vol. 292.

[q] Sir N. Bacon's Rules, Wyatt's Prac. Reg. 72 and 73. 2 Ves. 337; and see Corbett v. Corbett, 1 Ves. and Beames, p. 335.

[r] 2 Ves. 337. and see what Ch. Bar. Parker says, 2 Eq. Abr. 402.

want of a present Interest[s]. It has also been decided, that the next of Kin of a Lunatic, though the Lunatic be in the most hopeless state, have not such an Interest as qualifies them to file such a Bill[t]; nor will such a Bill lie during the life-time of the Lunatic to perpetuate the testimony of Witnesses to a will made by him previous to his Lunacy[v]; but a *vested Interest*, though the *least valuable* that can be conceived, gives a right to preserve Testimony[w].

It has been determined that a Plaintiff is entitled to perpetuate the testimony of witnesses to an *usurious* contract, notwithstanding his not offering *to pay* what is justly due[x]. And *Lord Hardwicke* has said, there is no certain distinction laid down where a Man is forbid to perpetuate testimony as to personal demands against himself[y].

A Bill may be brought to perpetuate Testimony, in many cases, where a Bill could not be brought for relief without waiving Penalties; as in *Waste*, or in the case of a *forged deed*, or in the Case of *Insurances*, after Commissions to examine Witnesses beyond Sea, as to fraudulent losses; and yet, in many cases, fraudulent losses are subject to a penalty, and are sometimes felonious[z].

It was said by the Lord Keeper, in Gell and

[s] Allan and Allan, MS. S. C. 15 Ves. 130.

[t] 6 Ves. 251. Lord Dursley v. Fitzhardinge.

[v] 1 Vern. 105. Sackville v. Ayleworth, and dicta to the same Effect by Lord Eldon, MS.

[w] Dursley v. Fitzhardinge, 6 Ves. 261.

[x] 1 Atk. 450. Earl of Suffolk v. Green; see also what Lord Hardwicke says, in Chancey v. Tahourdin, 2 Atk. 293.

[y] Ib.

[z] 1 Atk. 450. Earl Suffolk v. Green.

Hayward [a], that he would not allow examinations in *perpetuam rei memoriam*, for such trivial things as *right of Common*, or of *Ways*, or *Water Courses;* or, *at least, not till after a Recovery at Law* [b].

Such a Bill will lie to examine Witnesses to prove a *Modus decimandi* [c]. So, to prove a promise, &c. which is to be performed after the death of A [d]. So it will lie, in aid of a legal title, and before the action at Law is brought; as where a Bill was filed against the East India Company and their Secretary, praying a Commission to examine witnesses in India, and that the Defendants might discover by what authority the Plaintiff was dispossessed of a Lease for supplying Madras with Tobacco, the Plaintiffs intending to bring an Action [e]. But in *Egerton and Moslyn*, it was held that before an Action brought, a Bill for perpetuating the testimony of witnesses could not be supported [f]; but in this case the Trespass was committed by a *known* Defendant, whereas in the former case, the Bill was to discover by whom the Trespass was committed.

Where lands are devised by will, and there is no occasion or opportunity to prove and establish it at Law, it is a very common practice to file such a Bill as this, against the Heir at Law; for though by the same will, *goods and chattels* are bequeathed, yet the proving the same in the Eccle-

[a] 1 Vern. last Edition, p. 312.

[b] Ib. p. 308. Paulet v. Ingrey.

[c] 1 Vern. 184. Somerset v. Fotherby.

[d] Com. Dig. tit. Chancery, R.

[e] 1 Bro. 469. Mordalay against Morton.

[f] Ib. 470. Mordalay against Morton.

siastical Court will be of no avail with respect to the *Lands* thereby devised. The Defendant having appeared and answered a Bill for this purpose, the parties proceed to Issue as in other cases, and then the Plaintiff examines all the Witnesses, if living, to the proof of the original will, or proves the hand-writing of such of them as are dead, which being done and publication passed, there is an end of the Cause. After Publication of the Depositions of the Witnesses, in these cases, in order the better to perpetuate their testimony, it is usual to inrol the pleadings, with the Commission, Interrogatories and Depositions, and afterwards to exemplify them under the seal of the Court, and such exemplifications become evidence in support of the title of the Devisee in all Courts of Law and Equity ; and no other proof is necessary of such Copies, than the production of them [g].

If, in a Bill to perpetuate *testimony* respecting *a right of Common and Way*, the charges in the Bill are *too general*, and not sufficiently descriptive of any particular right, a Demurrer will hold [h]; for the Bill must set out the way exactly *per et trans*, in the same manner as it ought to be set out in a Declaration at Law [i].

With respect to the statement in the Bill of the *matter* touching which the Plaintiff is desirous of acquiring evidence, *Lord Eldon* has observed

[g] Gilb. Law of Evidence, p. 19. Peak's Evidence, p. 30.

[h] 1 Ves. jun. 449. Cresset v. Milton. S. C. 3 Bro. C. C. 481.

[i] Gell v. Huyward, 1 Vern. 312.

that great danger may arise out of such Bills, and that the facts which the Plaintiff wishes to be examined to, should be *particularly stated*[k].

As to shewing the *Interest of* the Defendant to contest the title of the Plaintiff in the subject, it has been determined, that, to a Bill brought to perpetuate testimony as to the *legitimacy* of the Plaintiffs, who were Infants, and entitled to a Remainder in Tail, after an Estate for Life, against others in Remainder, a Demurrer, by those who were the seventh and eighth in Remainder, on the ground, that their Interests were *too remote* to justify their being made Defendants, was overruled [l].

Lord Eldon put a case, where, it seems, he thought a Demurrer would lie; as where there is an eldest son illegitimate, and a devise to him by his Father, in Tail, who leaves the Reversion to descend; and he also has a Son by marriage, and a dispute has arisen; the eldest insisting he was not illegitimate; and the younger that the first marriage was to his Mother; and he as Reversioner should file a Bill to perpetuate testimony: "I am not quite sure," says *Lord Eldon*, "that in such a case the elder might not say, he being in possession as Tenant in Tail, might suffer a Recovery and destroy the Reversion, and therefore Equity could not interfere[m]."

As to the Witnesses being old and infirm, it seems, that a Witness is not, for the purpose of

[k] Bartlett and Hawker, MS.

[l] 6 Ves. 251. Lord Dursley v. Fitzhardinge.

[m] 6 Ves. 261. Lord Dursley v. Fitzhardinge, Allan v. Allan, MS.

this Bill, considered *old*, unless he is *seventy years* of age [n]; but in one case, an order was made to examine a surviving Witness to a will, *de bene esse*, upon an affidavit that the parties concerned lived in *Virginia*, and that the Witness was upwards of sixty years old, and greatly afflicted with the Gravel [o].

With respect to a previous investigation in a Court of Law, it may be observed, that a Demurrer will lie to a Bill of this kind, if there is no impediment to the Plaintiff trying his Right at Law [p], unless where it is to preserve the testimony of Witnesses old and infirm, who may die before a Trial at Law.

A Devisee will not be allowed to examine Witnesses, on such a Bill, to prove a will against a *purchaser* without notice, until the will has been established by a verdict at Law [q]; and in such case, a Purchaser may protect himself by *plea* [r], or *demurrer* [s]. But it is otherwise when the Party filing the Bill, is himself in possession, for then, he has no occasion to establish his right at Law. On these grounds, it has been holden, that if such Bill is filed by one, out of possession, having only a right to a fishery, a demurrer will lie [t].

[n] Ambler, 65. Fitzhugh against Lee.

[o] Ib.

[p] 1 Vern. 441. Parry v. Rogers, 1 Dick. 55. Cox v. Colley, Wyatt's Prac. Reg. 74. 1 P. Wms. 117. Philips v. Carew, Brandlin v. Ord, 1 Atk. 571.

[q] 1 Vern. 354. Bechinell v. Arnold.

[r] Ib.

[s] 1 Vern. 441. Parry v. Rogers.

[t] Prec. Ch. 531,2. and see

With respect *to Costs* in Bills of this kind, they are never given against the Defendant[v]; and the Defendant is entitled to his costs immediately after the commission is executed, provided he did not examine any Witness[w]. Where a Bill is brought against an Heir at Law, to perpetuate the testimony of Witnesses to the will, though he by his answer neither confesses or denies its validity, but leaves the Plaintiff to make such proof of the due execution of it, as he shall be advised, and though the Defendant *cross examines* the Witnesses, yet he is entitled to be paid his taxed Costs; but if he examines Witnesses of his own as to the Execution of the Will, he thereby makes use of the Plaintiff's Bill to perpetuate testimony on his part, and is not, it seems, entitled to his costs[x].

10. *Bills of Discovery.*

Every Bill requiring an answer, is, more or less, a Bill of Discovery; but the Bill here meant, and to which that title is peculiarly given, is a Bill employed merely for the Discovery of facts in the knowledge of the Defendant, or of Deeds or Writings, or other things, in his custody or Power, but praying no further, or other Relief; or merely a Commission for *the examination of Witnesses*[y].

what is said in Mayor of York v. Pilkington, 1 Atk. 284.

[v] 1 Atk. 610. Clifton v. Orchard. The case in 2 Atk. 167. is not now the rule.

[w] Foulds v. Midgley, 18 Ves. 138.

[x] 1 Sch. and Lefr. 317.

[y] See 1 Bro. C. C. 471.

This Bill is usually employed, in aid of the Jurisdiction of some other Court, (even of a *Foreign Court*[z] if necessary,) to enable the Plaintiff to prosecute or defend an action, a proceeding before the Council, or any other legal proceeding, of a nature merely civil[a], before a Jurisdiction which cannot compel a Discovery on Oath; but, it appears, the Court of Chancery has in some instances, refused to give this aid to the Jurisdiction of the very inferior Courts[b]; nor will it give a Discovery in aid of an arbitration[c]. This Bill lies also in aid of proceedings in Chancery, in order to deliver the party from the necessity of procuring Evidence[d]. And it is observable, that wherever the assistance of a Court of Equity is required, upon equitable circumstances, a *Discovery*, for instance, a Bill will lie for a *legal demand*; and in such case, the Bill is retained, with liberty to bring an action[e].

The Bill states the matter touching which a Discovery is sought, the Interest of the Plaintiff or Defendant in the subject, and the right of the former to require the Discovery from the latter[f].

[z] Mitf. 150. n. 1. and see 2 Anst. 467.

[a] Ld. Mountague v. Dudman, 2 Ves. 398.

[b] Mitford's Pleadings, p. 52. See also 1 Ves. 205. Earl of Derby v. Duke of Athol.

[c] 6 Ves. 821.

[d] Lord Montague v. Dudman, 2 Ves. 398.

[e] See Buxton v. Sidebotham, 2 Ves. jun. 520. see also Stevens v. Praed, 2 Ves. jun. 519. Wright v. Hunter, 5 Ves. 792. see also Barker v. Dacie, 6 Ves. 688.

[f] See to this effect Mitford's Pleadings, p. 52.

With respect to affidavits to accompany Bills of this description, the rule appears to be that, where a Party comes only for discovery of a Deed, he need not make oath of the loss of it, as he must do when he comes for *Relief*; for he is not allowed to translate the Jurisdiction, without Oath made of the loss of the Deed [g], and this is the constant distinction [h].

Where the Discovery is *immaterial* [i], or where on the face of the Bill, it appears, there can be no remedy, a discovery would be merely im-

[g] 1 Vern. 247. Godfrey v. Turner. See also 2 P. Wms. 546. Whitchurch v. Golding, and the cases there cited, Anon. 2 Atk. 17; and see ante 24.

[h] 3 Atk. 132. Dormer v. Fortescue; and see Anon. 3 Atk. 17. There are, however, some cases which seem to the contrary, such as Precedents in Chancery, 536, and 1 Vern. 59. Anonymous, where it is determined, that when a Man exhibits a Bill for the discovery of a deed, and prays in his Bill a discovery only, there an oath must be made that the Plaintiff has lost the Deed; see also Bunb. 46. and Finch's Rep. 239. The learned Editor of the last Edition of Vernon, in his note to the case in 1 Vern. 59. approves the doctrine as stated above; but in his note to the subsequent case, in 1 Vern. 180. Anonymous, he seems to adopt the case, in Precedents in Chancery, 536. In Gilbert's Forum Romanum, p. 52. the distinction is stated to be, "that if a Bill be brought for discovery of writings in general, no demurrer can be to such Bill for want of an affidavit annexed; but if a Bill be brought for the discovery of a particular Deed or Bond, for which there is a proper remedy at Law, then they must annex such affidavit to the Bill, though it be but for discovery, because otherwise, the answer would be but an unnecessary expence."—Hinde seems to have copied this statement of Gilbert. See Hinde's Ch. Practice 1 vol. p. 143. Indeed, the Books of Practice have shewn little discrimination on the subject; but, the true distinction seems to be as above stated, and certainly it accords with the old practice, as appears by "The Clerk's Tutor in Chancery," Introduction, p. 41. See also 8 Vin. Abr. p. 550.

[i] Mitford's Pleadings, 155. and the cases there mentioned: and see 1 Bro. C. C. 96. 1 Anst. 82. Hinks v. Nelthorpe, 1 Vern. 204.

pertinent, and is therefore not enforced[k]; but where the Bill avers that an action is brought, or where the necessary effect in Law of the case stated by the Bill, appears to be, that the Plaintiff has a *right* to bring *an action*[l], he is entitled to a discovery to aid that action, so alledged to be brought, or which he appears to have a right and an intention to bring[m]; but it has never been laid down, that a person can file a Bill, not venturing to state *who are the Persons against whom the action is to be brought*, nor stating such circumstances as may enable the Court, which must be taken to know the Law, and therefore the liabilities of the Defendants, to judge,—but stating circumstances, and avowing that he has a right to an action against the *Defendants, or some of them*[n]. Upon these Principles, a Demurrer was allowed, to a Bill which did not alledge with sufficient certainty, *by whom* the duties claimed by the City of London under Letters Patent, in respect of which, a Discovery was prayed in aid of an action, were payable[o]. If the Bill had

[k] See Rondeau and Wyatt, 3 Bro. C. C. 154 : and see 4 Bro. C. C. 180. 2 Ves. jun. 56. 3 Ves. 422. Finch 36,44. Mitford Pleadings, 151.

[l] It is by no means necessary that an action should be brought previous to a bill of discovery in support of an action, Mordaly v. Moreton and East India Company, 2 Dick. 34. S. C. 1 Bro. C. C. 468.

[m] In Finch v. Finch, 2 Ves. 294. it was said a Bill of discovery does not lie to create evidence for a future cause; but see 1 Bro. C. C. 469. q. 2 Dick. 652.

[n] 8 Ves. 404. Mayor and Citizens of London v. Levy.

[o] 8 Ves. 398. 1b.

stated, 'that by reason of combination, it was so managed that the Plaintiff could not bring an action, and therefore there ought to be an account of the Fees in a Court of Equity, it might have been so shaped [p].

It has been held that an Heir stands in no need of, nor can he call for, a Discovery of Writings, unless he claims under some concealed deed of *Entail* [q]; but *Lord Hardwicke* carried the Rule farther, and held, that every Heir at Law has a right to a discovery, by what means, and under what Deed he is disinherited, if by his Bill, he states the particular facts, on which he founds his claim [r]; but in such case, it seems, the Defendant may plead, in bar of the discovery, that the Plaintiff *is not Heir* [s].

[p] 8 Ves. 405. Ib.

[q] See 3 P. Wms. 295. Tanner v. Wise.

[r] 1 Atk. 540. Harrison v. Southcote.

[s] Sed Vid. contra, Gun and Prior, 2 Dickens 657. but more at length in note to Forrest's Rep. p. 88. see also Newman and Wallis, 2 Bro. 143. But Lord Thurlow seems to doubt whether he had determined that case rightly, See Hoyle against Noyes, 3 Bro. 489. Forrest's Reports, p. 85. Lord Redesdale in his excellent Treatise, observes, that if the Plaintiff by his Bill, states himself to have an Interest which entitles him to call on the Defendant for a discovery, though, in truth, he has no such Interest, the Defendant may by plea, protect himself from making the discovery, as it may involve him in difficulty and expence, and perhaps may be prejudicial to him in other cases. Thus, says he, if a Plaintiff states himself to be Heir or Administrator of a person dead intestate, and in that character seeks a discovery from a person in possession of property which did belong to the deceased, of his title thereto, or of the particulars of which it consists; the defendant may plead that another person is heir or personal representative, or that the person alledged to be dead, is living. Mitford's Pleadings,

The Title of an Heir, is a legal one. If he cannot set aside a will disinheriting him, he has nothing to do with the Deeds, unless perhaps in the case of a Peer disinherited by his Ancestor[t]; nor is he, it seems, entitled to a discovery, unless there are Incumbrances, standing in the way which the Court would remove in order to his asserting his legal right. It is not so with an *Heir in Tail;* a Will is no answer to an Heir in Tail: an *Heir in Tail* has, beyond the general right, such an Interest in the Deed creating the Entail, that the Court, as against the person holding back that deed, would compel the production of it[v].

If a Plaintiff has set forth a Title in contradiction to the Defendants, he has no right, generally speaking, to look into the Defendant's title[w]; but if the same deed constitutes in part the defence, and in part the Plaintiff's title[x]; if, for instance, the Bill charges that by producing the Deed, it will appear that the person under whom the Defendant claims, is only Tenant for Life, some answer must be given, and a statement of what a Defendant

p. 223. Ord against Wilkinson, Trin. 1773. See Forrest's Rep. in note to p. 90. Mr. Fonblanque in his able notes to "the Treatise on Equity," 2 Vol. 484. n. e. has adopted this very reasonable doctrine; and the Practical Register, p. 326. last Edit. supports it, and so, also, does a case in Finch, Finch's Rep. p. 36; but it is deserving of consideration whether the more modern case to which I have alluded, in Forrest, ought to be considered as correcting the generality of the proposition they enforce.

[t] See Earl of Suffolk v. Howard, 2 P. Wms. 176. but see the observations on that case in Hylton v. Morgan, 6 Ves. 296.

[v] Lord Shaftsbury and Arrowsmith, 4 Ves. 71.

[w] See 13 Ves. 251.

[x] Ib. 252.

barely knows and believes is not sufficient, but he must state *how the fact is* by the Deed. If the Defendant pleaded he was a Purchaser for a valuable consideration, it would be different [x].

Where a Bill prayed that the Defendant might state the particulars of his Pedigree as Heir, and of the Births, Baptisms, Marriages, &c. a Demurrer was allowed [y], a Plaintiff having no right to a discovery unless he lays a foundation for it [z].

A Bill of this nature lies, it seems, against third persons for the discovery of monies paid after notice of a *Sequestration* [a]. So it lies for a discovery of *Concealments* of a *Bankrupt's Estate* [b]. It lies, also, against Assignees to discover a fraudulent Bankruptcy, to defeat the Plaintiff's Execution [c].

So, a defendant, a *Lessee*, has been compelled to discover whether his Lease was *expired or not* [d]; and to discover to whom he has *assigned* [e]. But the *Assignee* of a Lease will not be forced to discover whether the Lease has expired, he being a purchaser and not bound to discover [f].

A Bill of discovery lies to ascertain *Boundaries* [g]. Such a Bill lies also for a discovery of *Court Rolls*, *Ledgers*, &c. to be used at a Trial, relating to the

[x] Stroud v. Deacon, 1 Ves. 38; and see Hall v. Daniel, 2 Vern. 463. and the cases in the note.

[y] Ivy v. Kekewick, 2 Ves. 679.

[z] Rennison v. Ashley, 2 Ves. jun.

[a] Simmonds v. Lord Kinnaird, 4 Ves. 735.

[b] 1 Atk. 289.

[c] King v. Martin, 2 Ves. 641.

[d] Tothil, 69. 8 Vin. Abr. 536.

[e] Tothil, 71.

[f] 8 Vol. Vin. Abr. 550. Fonblanque's Treatise of Equity, 2 vol. 488. I cannot find the Case referred to in Vernon.

[g] Aston v. Lord Exeter, 6 Ves. 293.

Plaintiff and Defendant[g]; or for the discovery of a Note, Deed, &c. though six years are elapsed; for the Statute of Limitations is no plea to such a Bill[h]. It lies to discover a *Patron*, whereby the Party may be impowered to bring a *Quare impedit*[i]. So, it lies by a Lord of a Manor for the discovery of *Treasure Trove*[k]; and, as it seems, in a proper case, for the discovery and production of a Deed in aid of an Action for a fine[l], under the stat. of the 9 G. 1. c. 29[l]. So it lies against a Lord of a Manor to discover Court Rolls[m]; and by the *Attorney General* against an *Outlaw* to discover his Real and Personal Estate[n]; or by the *Patentee* of the *Goods of a Felon*, or one outlawed[o]; and for the discovery of a Promise of Marriage, in aid of an Action of Assumpsit[p]; or of goods *pawned*, belonging to the Plaintiff[q]. So, where a Ship took fire by the negligence of the Master or Ship's Crew, such a Bill was held to lie for a discovery, to enable the Plaintiff *to bring his Action*[r]; similar to the Case of the Owner of a Wharf and Lighter, against whom such a Bill was brought, to enable the Plaintiff to bring an Action for damages his goods had sustained, by the negligence of the Lighterman[s].

[g] Hard. 180.
[h] Ch. Rep. 14. Bunb. 60.
[i] Tothil, 262.
[k] Bunb. 18.
[l] See 13 Ves. p. 240.
[m] 2 Ves. 621. Anonymous.
[n] Hard. 22. Eq. Ca. Abr. 75. S. C.
[o] Cary Rep. 1. 21. Hard. 22.
Treatise of Equity, 2 vol. p. 481. Mr. Fonblanque's edition.
[p] Forrest's Rep. 42.
[q] Hoare against Parker, 1 Bro. C. C. 578.
[r] Fonblanque's Treatise of Equity, 2 vol. p. 481.
[s] Sir John Heathcoate v. Sir John Fleete, 2 Vern. 442. last

It has been held that if a Bill is brought by a Son against his Father for the discovery of Deeds, as auxiliary to an Action to be brought at Law, or relief sought in a Court of Equity, he is entitled to it; so, if for a discovery in order to Mortgage for *proper purposes*, and the Lord Chancellor said, "I will not determine whether in Case the Son was about marrying, and the Father will not discover his settlement, and what right the Son is entitled to, in that Case, he ought not to have such a discovery." But the Court will not give way to new inventions, in order to promote suits and uneasiness in Families[t].

Such a Bill lies against a *Jointress* to discover Writings; but in such case, the Plaintiff must agree to confirm her Jointure, and such, *Serjeant Maynard* said, *was the Course of Chancery*[v].

A discovery has been decreed, though *against* the *express words* of a Will, importing that "the declaration of the Executor should be taken, without being compelled thereto by Law[w]."

Judgment Creditors have a right to a discovery where the Creditor's Real or Personal Property is, in order to make their Judgments available[x]. So, a Bill may be filed against a Bankrupt and his

edition, and see also Morse v. Buckworth, ib. p. 443.

[t] Ambler's Rep. 154, 5. Lord Lempster against Lord Pomfret.

[v] Ventris, 198. Ford v. Peering, 1 Ves. Jun. 76. Senhouse v. Earl, 2 Ves. 450.

[w] 2 Ch. Cas. 198.

[x] Vid. Mountford v. Taylor, 6 Ves. 792.

Assignees to discover a fraudulent Bankruptcy, employed to defeat the Plaintiff's Execution [y].

If A. obtains a Judgment against B. and takes out Execution and gets it returned, *Nulla Bona*, he may bring a Bill against the Defendant or any other, to discover goods or Personal Estate of B. and by that means to affect the same [z]. And Tenants for Years are compellable to discover the time of the making, Commencement and Determination of their Leases, and what Rents are reserved, and the times the same are payable, to the end, that the same may be liable to an Extent [a].

Lord Rosslyn put the following Case on this subject. Suppose a Box of Jewels was pledged by a Person, not the Owner, but a mere Bailee; the Pawnee supposing the Person in possession actually the true Owner, and there being no reason to think otherwise, there would be no difficulty in a Court of Equity in obliging him to explain, and set out that Property, of which he admits the title to lie in another, only claiming the value for which it was pledged, a description that will make it the subject of an Action at Law [b].

Any Person in possession as Tenant, or otherwise, may file a Bill for a discovery of the Title

[y] King v. Martin, 2 Ves. 641.

[z] Balch v. Wastall, cited by Mr. Vernon, 1 P. Wms. Rep. 445; see also 1 Vern. 399. Smithier v. Lewis.

[a] Toth. 281.

[b] 3 Ves. 226. Strode v. Blackburne, see also 1 Vern. 307. E. I. Company v. Evans, and expressly to the same effect, Ib. 407. Marsden v. Panshall.

of one bringing an Ejectment against him, even though he is a wrong doer against every body [c].

So such a Bill lies for the discovery of Goods, put on board a Ship, though insured at *a sum certain, Interest or no Interest;* for the value of the Goods saved, ought to be deducted out of the sum to be paid for Insurance [d].

It has been holden that a Person may be obliged to discover a Case, which he had stated to his own Counsel for his opinion, and the facts stated in the Case [e].

So a Bill lies for the discovery of *Assets,* to enable the Plaintiff to bring an Action at Law, against an Executor or Administrator; but in this case the Bill must charge, that Assets or Goods of the Testator came to his hands [f].

So for a discovery of Wine imported, for which *Prisage* is due [g]; or against an *Auditor* for a discovery whether the particular by him made is true, though he is *fineable*, for the deceit to the King, if false [h].

Such a Bill does not lie to compel a *Purchaser for a valuable Consideration, without notice of the* Plaintiff's Title, to make a discovery which may affect his own Title; and this is "an *infallible* Rule [i]." And the Assignee of a Purchaser for a

[c] 1 Ves. 248. Metcalf v. Harvey.
[d] 2 Vern. 716.
[e] Stanhope v. Roberts, 2 Atk. 214.
[f] Ch. Ca. 226.
[g] Hard. 138.
[h] Ib.
[i] Jerrard v. Saunders, 2 Ves. Jun. 454. see many Cases on this subject collected, 8 Vin. Abr. 546. and what Serj. Maynard says, 1 Ventr. 198.

valuable consideration without notice, is entitled to the same protection[k]. On this ground a Mortgagee may protect himself from a discovery of his Title Deeds, although the Plaintiff brings his Bill to redeem ever so strongly[l]; but to this Rule there is an exception in Cases where a *Dowress* claims a discovery[m]. So, too, such a Bill will not lie to discover the *Tenant to a Præcipe* on a Voluntary Conveyance[n]. Nor will it lie to discover who is *Tenant of the Freehold*, for the purpose of bringing a *Formedon*, for there are ways to *know it without*[o]. But such a Bill lies for the discovery of a Tenant to an Estate whereby to ground an Action of *Dower*[p], or in a Case of *Partition*[q]. It does not lie in aid of the Jurisdiction of the *Ecclesiastical Court*, because that Court is capable of enforcing a Discovery[r]. Nor does it lie to discover whether a particular person *exists*, or *where* he is, to enable the Plaintiff to make him a *party to a Bill*[s].

After a *Verdict*, such a Bill does not lie in support of a fresh Action. As where the Plaintiff for want of being able to prove a Letter wrote to him

[k] Sweet against Southcote, 2 Bro. C. C. 66. Lowther against Carlton, 2 Atk. 139, 242. S. C. temp. Talbot, 186. Barn. 358.

[l] Senhouse v. Earl, 2 Ves. 450.

[m] Williams against Lamb, 3 Bro. 264.

[n] Sherborne v. Clark, 1 Vern. 273. Stapleton v. Sherrard, Ib. p. 213. S. C. Eq. Cas. Abr. 76.

[o] Stapleton v. Sherrard, 1 Vern. 212. Sherborne v. Clark, Ib. p. 273; see also Vin. Abr. 8 vol. p. 537. Ib. 554.

[p] Toth. 84.

[q] Hard. 139.

[r] Dun v. Cotes, 1 Atk. 289. 8 Vin. Abr. 537; see also Earl Derby v. Duke of Athol, 1 Ves. 205. and Anonymous, 2 Ves. 451.

[s] Chancey v. Tahourdin, 2 Atk. p. 393.

by the Defendant, filed a Bill of Discovery to clear up the matter, the Defendant *pleaded* the *Verdict,* and that the effect of the Letter was given in Evidence at the Trial, and also *demurred*, for *want of Equity*, and the Plea and Demurrer were allowed [t]. So in another Case, where Money was paid in part of an Account for Goods, but the Receipts were lost, and the whole was recovered at Law, and a Bill of Discovery was then filed, the Lord Keeper *North* said, "you come *too late* for a *Discovery* after a *Verdict* [u]."

It appears to be an established Rule, that (except in the Case of *Corporations* [w],) a mere witness cannot be made a Defendant to a Bill of this description [x]; and therefore where a Bill was brought for a Discovery in aid of an Action, a Demurrer was on this ground allowed, though the discovery in this Case would probably have proved more effectual, than the examination at Law; and though there was a charge in the Bill of an Interest in the Defendant, with reference to which he might be used as a witness by the Plaintiff, he waiving the objection of Interest, and if called against him might be examined upon the *voir dire* [y]. So, a Witness to a Will cannot be

[t] Ch. Cases, 65. Vin. Abr. 8 vol. 542.

[u] Barbone v. Brent, 1 Vern. p. 176.

[w] Wych v. Meal, 3 P. Wms. 310. Anon. 1 Vern. 117. and see Le Texier v. Margravine of Anspach, 15 Ves. 159.

[x] See Plummer v. May, 1 Ves. 426. Finch v. Finch, 2 Ves. 493. Cookson v. Ellison, 2 Bro. C. C. 252. Cartwright v. Hateley, 1 Ves. Jun. 292.

[y] Fenton v. Hughes, 7 Ves. Jun. 287; see also Plummer v. May, 1 Ves. 426. Finch v. Finch, 2 Ves. 493. Whitworth v. Davis, 1 Ves. and Bea. 549.

made a Party, unless where the Will is impeached as obtained by fraudulent practices. But if a Witness answers, he must answer fully [z].

It is a general Rule, applicable, indeed, not merely to this description of Bill, but to all kinds of Bills, that no person can be compelled to give a discovery that may subject him to a Prosecution for Felony [a], or to answer what is a matter of Scandal [b] [c], or what may lead to a legal accusation [d], or to what *may* subject him to a penalty, and not merely what *must* [e]; or any thing *in the nature* of a penalty [f], or Forfeiture [g]; but if the Plaintiff *waives* the Penalty or Forfeiture, the Defendant must then discover [h]; but the waiver ought to be by all those who can claim any part of the penalty or forfeiture; for if the penalty belongs one half to the King, and the other to a Corporation, the waiver by the Corporation, and not by the Attorney General also, is not sufficient [i]. But if the Defendant has *covenanted to answer* any Bill of Discovery, and not to plead the Acts in-

[z] Pearson against Pearson, 1 Bro. 293.

[a] Cartwright v. Green, 8 Ves. 408.

[b] See Franco v. Bolton, 3 Ves. 370.

[c] Finch v. Finch, 2 Ves. 492.

[d] Bishop of London v. Fytche, 1 Bro. 98. Exparte Symes, 11 Ves. 525. Mayor, &c. of London v. Levy, 8 Ves. 405.

[e] Harrison v. Southcote, 1 Atk. 539. Harrison v. Southcote, 2 Ves. 389. Brownsword v. Edwards, 2 Ves. 245.

[f] Smith v. Read, 1 Atk. 529.

[g] Toth. 69. 2 Ch. Rep. 68. Eq. Ca. Abr. 77.

[h] Bird v. Hardwicke, 1 Vern. 109. E. I. Com. v. Sandys, 129. E. I. Com. v. Evans et al, 306. 1 Ch. Rep. 144.

[i] E. I. Com. v. Sandys, 1 Vern. 129.

flicting penalties[k], in such case he is bound to answer.

A Barrister is not bound to discover as to writings he has seen, nor any thing he knows in a Cause as Counsellor[l]; but if any thing comes to his knowledge before he was a Counsellor, or upon any other account, he is obliged to Answer[m].

In one case it was doubted, if a thing were revealed under the condition of Secresy to one not a Barrister, whether or no he would be obliged to answer[n].

So an Attorney cannot be obliged to discover matters relative to the Estate, and Affairs of his Client[o]; but he is compellable to answer, whether there are Deeds, and also, *where* the same are, and to whom they are delivered, and when he last saw the same, and in whose custody; but not to produce or discover the dates or contents of them[p]. It is said a *Trustee* may and ought to produce writings[q].

Where several are Partners in an unlawful or Clandestine Trade, and one of them brings a Bill of Discovery against the others, they cannot plead that their Answer may subject them to the penalty of an Act of Parliament; for by their going on in such Trade they seemed to have entirely *waived* that unlawfulness as between themselves[r].

[k] Strange, 168.
[l] Bulstrod v. Letchmere, 2 Freeman 5.
[m] Ib.
[n] Ib. 5.
[o] Finche's Rep. 82.
[p] Finche's Rep. 259. S. C. 8 Vin. Abr. 548.
[q] 1 Ventr. 197.
[r] Gilbert's Eq. Rep. 186. 8 Vin. Abr. 540.

The Court of Chancery will also a *Remedial Law*, and not suffer its own notions to be made use of to elude any beneficial law ; as if a Trustee does by Fraud and Combination with the Cestui que Trust endeavour to *evade any penal law*, as the stat. of *Simony*, &c. under the pretence that a Trust is only cognizable in Equity, and that Equity should not assist a Penalty or Forfeiture, it will compel a Discovery[s].

As to the Bill not praying Relief, it has been determined, that if a Bill is brought for a Discovery *and Relief*, in a Case where the Party is only entitled to a *Discovery*, a Demurrer will lie ; for it is incumbent on the Plaintiff, to shape his Bill according to what he has a right to pray[t]. But where the Plaintiff is entitled to the discovery he seeks, in support of an Action, and he prays for general relief, or for relief that is consequential to the prayer for discovery, as an Injunction, a Demurrer does not lie[w]. And it may be useful to observe that the modern doctrine is, that if a Bill be brought for a discovery and Relief, and the discovery is sought for the purpose of the Relief, if a *Demurrer*, or a *Plea*[x], will hold to the Relief prayed, the Defendant cannot have *the Discovery*. And it seems,

[s] Eq. Ca. Abr. 131. 8 vol. Vin. Abr. 547.

[t] Muckleston v. Brown, 6 Ves. 62. Gordon and Simpkinson, 11 Ves. 509 ; and see Price against James, 2 Bro. 319.

[w] Brandon v. Sands, 2 Ves. jun. 514.

[x] Sutton v. Earl Scarborough, 9 Ves. 71.

if the Bill prays *Relief*, as well as a discovery, and the discovery is auxiliary to the Relief, a Demurrer to the discovery alone will not hold [y].

Upon a Bill praying nothing but a Discovery, the Defendant is entitled to Costs [z], as between *Attorney and Client* [a]; but Mr. *Justice Buller* thought the Rule thus laid down, was *too general;* and was of opinion that if the Plaintiff is entitled to the Discovery, and goes first to the Defendant to ask for the Accounts, he has in justice a right to, if the Defendant refuses, and the Plaintiff is thereby compelled to file a Bill for a Discovery, he ought not to have Costs; but if the Plaintiff files his Bill without trying first to get the discovery in that way, in which Men acting with each other ought first to ask their rights, he ought to pay Costs [b]. In a Case at Law [c], the Counsel complained of the hardship of a Plaintiff in Equity being obliged to pay the Costs of a Discovery; upon which *Lord Kenyon* observed, that he had once heard *Lord Mansfield* say, he thought in such a Case, the Court of Law ought to allow the Costs paid to the Defendant in Equity, as Costs at Law: that he was struck with the propriety of the observation, and thought it would be a good rule to be adopted.

[y] Forest's Rep. in the Exch. 129.

[z] Simmonds v. Lord Kinnaird, 4 Ves. 746.

[a] Cartwright v. Hately, 1 Ves. jun. 293.

[b] Weymouth v. Boyer, 1 Ves. jun. 423; see also what is said 2 Ch. Cases; and I have heard Lord Eldon approve this doctrine.

[c] Grant v. Jackson and others, Peake's N. Prius, p. 203.

If the Defendant puts in his Answer in the Vacation, and *no exception* is taken to it in the first eight days of the succeeding Term [d], he may move for an order for payment of the Costs of the discovery; so that it is not quite accurate to say [e], that the moment the Answer *comes in*, the Defendant must be paid all the expence he has been at.

Where a Bill prays a Discovery and a commission to examine Witnesses, the practice is settled to be, that the Defendant is not entitled to move for his Costs, till the return of the commission; and even then, not to give the Defendant his Costs, if he examines Witnesses *in Chief*, instead of confining himself to a Cross examination [f].

If after the Defendant has answered, the Suit becomes abated, it cannot be *revived* [g]. Where, therefore, the Plaintiff was a *feme sole* when she filed her Bill of Discovery, and afterwards married, whereby the Suit *abated*, the Suit, it was holden, could not be revived for Costs—a hard determination, reluctantly followed by *Lord Eldon* [h].

The Defendant cannot move to dismiss such a Bill as this, for want of prosecution [i]; for the cause ends with the *Answer* [k]: and in one case where such a Bill was improperly brought to an

[d] Stewart v. Semple, 5 Ves. 86. so stated by counsel, and seemingly, assented to by the Chancellor.

[e] See Hindman against Taylor, 2 Bro. C. C. 11.

[f] Anonymous, 8 Ves. 70; see also Banbury v. ———, 9 Ves. 103.

[g] Alpha v. Payman, 1 Dick. 33.

[h] Dodson v. Juda, 10 Ves. 31.

[i] Woodcock v. King, 1 Atk. 286. Mos. 185. pl. 95.

[k] 2 Bro. 10.

hearing, the question was, whether the Bill should be *dismissed*, or the cause *struck out of the Paper*, and his Honor took the latter course, because, such a Bill is *never dismissed*, the words of a dismission being, "The Court seeing no cause to *relieve*[1]."

11. *Bills Quia Timet.*

The denomination of Bills *Quia Timet* was borrowed, probably, from the Title of some ancient Writs at the Common Law; for as Lord Coke observes, "there be six Writs in Law, that may be maintained *quia timet*, before any molestation, distress, or impleading, as, 1. A Man may have his Writ or mesne, before he be distrained; 2. A *Warrantia chartæ*, before he be impleaded; 3. A *Monstraverunt*, before any distress or vexation; 4. An *Audita querela*, before any execution sued. 5. A *Curia claudenda*, before any default of Inclosure; 6. A *Ne injuste vexes* before any distress, or molestation. And these," says Coke, "be called *brevia anticipantia*, Writs of Prevention[m]."

When a Person is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen, or be occasioned, by the neglect, inadvertence, or culpability of another; or where any property is bequeathed to one, after the death of another in existence, and which the former is desirous of having secured safely for his use, against the effects of any Accident, which

[1] See on this subject, Hodgson against Dand, 3 Bro. C. C. 475.

[m] Co. Litt. and see 7 Bro. P. C. 125. Toml. Ed.

may happen to it previous to the accruing of his possession, in either of these Cases, a Bill of the above description may be exhibited, which in the one instance will quiet the party's apprehensions of a future inconvenience, by removing the Causes which may lead to it; and in the other, will secure, for the use of the party, the property, by compelling the person in the present possession of it, to guarantee the same by a proper security, against any subsequent disposition, or wilful destruction[n].

Thus, in a Case decided by *Sir Thomas Clarke*, a Bill was filed by a Legatee for the security of a Legacy which the Defendant, an Executor, was to pay at the end of Ten Years after the Death of the Testator; and the prayer of the Bill was, that the Defendant might admit assets and give security or pay the Money into the *Bank;* and though no particular reasons were assigned, such as wasting Assets or Insolvency in the Defendant[o], a decree was made that the Defendant should pay the Money into the Bank, and that he should have the Interest in the mean time, and that at the end of the Ten Years the Principal should be paid to the Plaintiff[p].

So, in a Case, where a Legacy was left to one *to be paid* at twenty-four, the Plaintiff being only twelve years old, the Father filed a Bill to invest

[n] Analysis of the Practice of the Court of Chancery, p. 43. Hinde's Prac. 128.

[o] Some such reason seems to have been assigned in the earlier cases; see 1 Ch. Cases 121.

[p] Ferrand against Prentice, Ambl. p. 273. But more fully stated by Lord Thurlow, in Green and Pigot, 1 Bro. 105.

the Legacy in the Funds, and so it was decreed, though it was at the same time declared, that the Plaintiff was not entitled to the Money till twenty-four[q].

In like manner, where £2000 was left to the Testator's Daughter at twenty-one, and in default, to her Child, and if no Child, to one *Mills;* a Bill was filed to secure the Fund, and the Court held that a party so circumstanced was entitled upon such Bill, to have part of the Personal Estate secured for the Legacy[r].

The Doctrine seems to be the same, whether the Legacy be payable at a *fixed*, or a future, *Contingent*, day; as where a Legacy was left to a Female Infant to be paid at twenty-one or Marriage with Interest at 4 per cent., but if she died before to sink into the Residue: on a Bill filed, the Court ordered the Legacy to be paid into the Bank, in order to secure the same, and if greater Interest than £4 was made, it should be for the benefit of the Child; for if it produced less Interest, the Executor would not be obliged to make up the deficiency[s]. In this Case, also, there was not the least surmise of any danger of losing the Legacy, from the circumstances of the Defendant[t].

In another Case, where the Testator had given the Plaintiff £15,000, to be paid at twenty-one,

[q] Walker and Cooke, 15 Feb. 1781. cited by Lord Thurlow, 1 Bro. 105.

[r] Johnson v. De la Cruze, 17th July 1749, cited by Lord Thurlow, in Green and Pigot, 1 Bro. 105. and mentioned in Ferrand against Prentice, Amb. p. 273; see also Studholme and Hodgson, 3 Peer Wms. p. 299. Pierce v. Taylor, Ib. 108.

[s] Green against Pigot, 1 Bro. 105; but see Palmer v. Mason, 1 Atk. 505.

[t] See S. C. 2 vol. Dick. Rep. 586.

or Marriage, with Interest in the mean time; but if she died before, to sink; the Master of the Rolls thought the Legacy must be appropriated, and he decided accordingly [v]. It must be observed, however, that in cases of this description the Court will not interfere to secure the Fund, upon the application of a Person who does not shew any Title [w].

Where one by will gave an *Annuity* out of his personal Estate, and a Bill of this kind was filed, the Master of the Rolls observed, "since the Executor has by his answer *submitted* it to the Court, whether he should give any Security, and appears to have *expressed* himself in words, threatening to defeat the Annuity, let the Master see a sufficient part of the personal Estate set apart, and assigned to a Trustee, in trust to secure the Annuity [a]. And where there has been no such submission by the answer, or any threats, yet the Court has in like manner interfered [b].

Other cases where Bills of this description have been held proper, are also to be found in the Reports.

As, where *A.* being seized of Lands in Fee granted a Rent-charge issuing thereout, and afterwards devised the Lands to *B.* for Life, with remainder to *C.* in fee, and died: it was held, that such a Bill was proper to compel *B.* to pay

[v] Carey against Askew, 2 Bro. 58.

[w] Browne against Duddridge, 2 Bro. C. C. 321.

[a] Batten v. Earnley, 2 P. Wms. p. 163.

[b] See Slanning v. Style, 3 P. Wms. 335,6. Rous v. Noble, 2 Vern. 249. S. C. 1 Ch. Cas. 121.

the arrears, for fear all should fall on *C.* the Reversioner; although it was urged, that this was a remote Possibility [c].

So, where *A.* was entitled to the use of Goods and a Library for Life, with remainder to the Plaintiff's Wife, who died, the Plaintiff, as her *Administrator*, brought a Bill of this description to have the Goods, &c. *secured* to him after the death of *A.*, and a decree was made accordingly [d].

The *validity* of such a bequest, as that last mentioned, was at one time questioned; but such bequests were decided by *Lord Somers* to be valid [e]. It seems, however, according to the observation of *Lord Thurlow*, that the cases as to a Tenant for life giving security for the Goods, have been *overruled*, and the Court *now* demands only an *Inventory*, which, he observes, is more equal Justice, and *that there ought to be danger, in order to require a Security* [f].

Where a Bill *Quia Timet* was filed to deliver up an Apprentice's Bond and Indentures, he being out of his Time, it was ordered, that the Defendant should either bring his action within a Year, or deliver up the Bond and Indentures; for if it were at the Master's choice to stay as long as he pleased, he would perhaps stay, till the Apprentice's Witnesses were dead [g].

[c] Hayes v. Hayes, 1 Ch. Cas. 223. S. C. 1 vol. Eq. Cas. Abr. p. 78. pl. 4.

[d] Bracken and Bentley, 1 Ch. Rep. 110. S. C. 1 Eq. Cas. Abr. 78. pl. 1.

[e] Hyde and Parrat, 1 P. Wms. p. 1. and to that effect are the subsequent cases, 1 P. Wms. p. 500. and 651.

[f] Foley against Burnet, 1 Bro. 279. Bill v. Kynaston, 2 Atk. 82.

[g] 1 Ch. Cas. 70. S. C. 1 Eq. Abr. pl. 2.

So, also, the *Lord Keeper North* thought, that if *A.* is bound for *B.* and has a Counter Bond from *B.*, and the money is become payable on the original Bond, Equity will compel *B.* to pay the Debt, *although A. is not troubled or molested for the debt*, since it is unreasonable that a Man should always have such a cloud hung over him [h].

A Bill of this nature lies to secure the property of a deceased Debtor from being misapplied by his Executor [i]. But such Bill must be filed against the Executor, and not against the *Debtors*, *&c.* of the deceased, unless, where the Executor and Debtors *collude* [k].

If the Executor is *insolvent*, on a Bill filed, a Receiver will be appointed, who may bring actions; and if Persons are about to pay Money to an insolvent Executor, the Court will restrain him from receiving it [l].

Pending a Litigation the Property is often in danger of being lost or injured, and in such cases, a Court of Equity will interpose to preserve it, if the Powers of the Court in which the Litigation is depending are insufficient for that purpose. Thus, during a Suit in an Ecclesiastical Court for administration of the effects of a Person dead, a Court of Equity will entertain a Bill for the mere preservation of the Property of the deceased, till the Litigation is determined [m]. But the

[h] Ranelaugh v. Hayes, 1 Vern. 190.

[i] 2 Atk. 212. 1 vol. of Fonbl. Equity, p. 42. in note.

[k] Elmslie v. Macauley, 3 Bro. 624.

[l] Utterson against Mair, 4 Bro. C. C. 277.

[m] Mitford's Pleadings, 122, 123. King and King, 6 Ves. 172.

Court will not interfere by appointing a Receiver, upon the mere ground, that two wills are in controversy in the spiritual Court, and no suggestion, that the Property is in danger, and cannot be secured by an administration *pendente Lite*[n].

12. *Bills for the delivery up of Deeds, or for securing them, or the delivering up of specific Chattels.*

Bills *for the delivery up of Deeds, or for the securing of them*, are classable under this head. The Court, however, seldom interferes in cases of this kind, and when it does, the relief is always upon Terms[p].

Lord Thurlow seems to have been of opinion that, as a general rule, it could not be maintained, that wherever one Party hath an Instrument upon which he cannot maintain an action at Law, he will be decreed in Equity to give it up[q]; nor would he, where a Partnership had been dissolved, and a note afterwards given in the name of the Partnership, by the Defendant, order the Plain-

[n] Richards v. Chave, 12 Ves. 462. Knight v. Duplessis, 1 Ves. 324. See on this subject ——— v. ——— argued on demurrer, 13th June, 1812. MS.

[p] Bromley v. Holland, 5 Ves. 618.

[q] See Hilton v. Barrow, 1 Ves. jun. 284. and Ryan against Macmarth, 3 Bro. C. C. 15.

tiff's name to be erased [r]; but this decision was not satisfactory to the Bar, at the time, for it is observable that the note did not on the face of it appear to be void, but only from collateral circumstances[s]: and in *Minshaw and Jordan*, cited before *Lord Thurlow* in the case alluded to [t], a note which on the face of it appeared to be good, was ordered to be delivered up.

There is no instance, it seems, of a decree for delivering up of a Bond, which on the face of it appears to be void [v]; and which by pleading at Law, may be shewn to be void [x]. *Lord Eldon*, however, (differing, as he confesses, from others,) always was of opinion, that a Court of Equity has the Jurisdiction, and duty, to order a void Deed to be delivered up, and placed with those whose Property may be affected by it, if it remains in other hands [z]; but a *voluntary Deed*, it seems, will not be ordered to be delivered up, unless fraud appears [a].

Where the *Legislature* declares certain Deeds and Instruments to be *void*, as the *Annuity* Act [b] does, there is inherent in the Court of Chancery

[r] 3 Bro. C. C. 15.

[s] Vid. arg. in Jackman v. Mitchell, 13 Ves. 585.

[t] 3 Bro. C. C. 19.

[v] Jackman v. Mitchell, 13 Ves. 585.

[x] Franco v. Bolton, 5 Ves. 368. But see what Lord Eldon observed of that case in Bromley v. Holland, 7 Ves. 19.

[z] The Mayor, &c. of Colchester v. Lowton, 1 Ves. and Bea. 244. Hayward v. Dimsdale, 17 Ves. 112.

[a] Colman v. Sarrel, 1 Ves. 50. S. C. 3 Bro. 12. Oxley v. Lee, 1 Atk. 624; and see Doe and Routledge, Cowp. 705.

[b] 17 Geo. 3. c. 26.

a Jurisdiction to order them to be delivered up[c]; but this is always on terms[d].

And so, where a Deed is void on grounds of *Public Policy*, as where a Bond is given in consideration of *future cohabitation*[e], it will be ordered to be delivered up, though the Plaintiff be *Particeps Criminis*, as he is also, in the case of a Marriage Brokage Bond[f]. And so, where a Bond was given to secure to one Creditor the deficiency of a composition, not communicated to the other Creditors[g], and where a Bond was given to procure an office contrary to Law[h], it was decreed to be delivered up; though to a person, who was *Particeps Criminis*[i].

Bills will lie to have Promissory Notes, or Policies of Insurance, delivered up, in cases where a *vexatious use* may be made of them[k]; but the Court will not order a *Power of Attorney*, which is *revocable*, to be delivered up[l]. So, contracts for the purchase of Estates have been ordered to be delivered up after the death of a Purchaser, and a Suit instituted for an account of Assets[m].

[c] Underhill v. Horwood, 10 Ves. 218. I believe Byne v. Vivian, 5 Ves. 604, was the first case. This was followed by Byne v. Potter, Ib. 609. Bromley v. Holland, Ib. 610. reversed on appeal, 7 Ves. 3. Hoffman and Cooke, 5 Ves. 623. Duff v. Atkinson, 8 Ves. 577; and see Philips and Crawford, 9 Ves. 214. S. C. 13 Ves. 475; and see what is said in Low v. Barchard, 8 Ves. 135.

[d] See the decree in Bromley and Holland, which seems to have been very carefully drawn up, 7 Ves. 29.

[e] Gray v. Mathias, 5 Ves. 28.

[f] Lord St. John v. Lady St. John, 11 Ves. 535, 6. and Shirley and Ferrers there mentioned.

[g] Jackman v. Mitchell, 13 Ves. 581; and see Eastabrook v. Scott, 3 Ves. 456.

[h] 5 & 6 Edw. 6.

[i] Law v. Law, For. 140. S. C. MS.

[k] Bromley v. Holland, 7 Ves. 21; and see Jervis and White, 7 Ves. 414. Kemp v. Prior, Ib. 249.

[l] 7 Ves. 28.

[m] Mackreth v. Marlar, 2 P. Wms. 68. in n. 1.

A Bill lies for the delivery up of Deeds unjustly detained; for in an action of Trover damages only can be obtained for the detention of the Deed, but not the deeds themselves[m].

If a Conveyance is made of an Estate with a power of Revocation, and it is afterwards revoked, a Bill lies to have the Conveyance delivered up[n].

So, if one settles Land upon his Daughter in Tail, and takes a Bond from her not to commit waste[o], or not to suffer a Recovery[p], the Bond will be ordered to be delivered up.

Where, to a Bill to have Deeds delivered up, the Defendant stated himself to be a Trustee for Mortgagees, *but did not name them*, he was decreed to deliver up the Deeds and pay Costs[q].

Such a Bill will not lie to have a presentation to a living, upon the next avoidance, delivered up, on account of gross misconduct in obtaining it[r].

In the case, of the Bankruptcy of a Person possessing Deeds, they will not be ordered to be delivered up on *Petition*, but a bill must be filed[s].

In some cases, it seems, a *Will* may be applied for to be delivered up, as an Instrument that ought not to vex the Plaintiff's Title; but if it

[m] Jackson v. Butler, 2 Atk. 306.

[n] Gilb. Eq. p. 1.

[o] Jervis v. Bruton, 2 Vern. 251.

[p] Tutton v. Mollineux, Moore, 809. approved 2 Vern. 251. but see Freeman v. Freeman, 2 Vern. 233. S. C. Prec. Ch. 28.

[q] Earl of Scarborough v. Parker, 1 Ves. jun. 267.

[r] McNamara v. ———, 5 Ves. 824.

[s] Ex parte Poole, 1 Ves. jun. 160.

contains in it, any thing that has validity, it ought not to be delivered up [t].

There are many cases where an agreement for the sale of Lands has been ordered to be delivered up [y]; and in which the Court has resolved that though it will not specifically perform an agreement, yet, where the conscience of the Party is not affected, it will not stand neuter, but order the contract to be delivered up, to prevent proceedings at Law [z].

Primâ facie, a *Tenant for Life* is entitled to the Custody of Title Deeds [v], (unless perhaps as against a Remainder-man whose Interest is expectant on the Tenancy for Life [w];) but if the Deeds have got into other hands, and the Tenant for Life is satisfied, and does not interest himself about them, a *Remainder-man*, it seems, may apply to have them delivered up [x].

Where Persons have had successive interests, in Real or Personal Property, Deeds have, on a Bill for that purpose, been ordered to be deposited in Court [a]; and there are a great many cases where a Remainder-man in Tail, or a Reversioner in Fee, has been held entitled to have the Title Deeds secured for his benefit, though an Estate for Life was standing out [b]. But, in general, the Title

[t] Pemberton v. Pemberton, 13 Ves. 298.

[v] Ford v. Peering, 1 Ves. jun. 76.

[w] Ivie v. Ivie, 1 Atk. 430.

[x] 1 Ves. jun. 78.

[y] See Willan v. Willan, 16 Ves. 83.

[z] Mortlocke v. Buller, 10 Ves. 308. see also 16 Ves. 83.

[a] See a case of that kind, Hodgeson v. Bussey, 2 Atk. 89.

[b] Smith v. Cooke, 3 Atk. 382. Reeves and Reeves, 2 Mod. 132.

Deeds remain with the Tenant for Life [c]; and it has been determined that such Relief will not be given against a *Father*, Tenant for Life, in favor of his *Son*, Tenant in Tail [d].

The cases in which the Court interferes, are where the Remainder-man has been a *stranger* to the Tenant for Life, and not where he is Tenant for Life under a Settlement made by a Grand-Father, with remainder to the Son in Tail only, remainder to the Grand-father; but in such case, if there were Evidence that the Father was destroying the Deeds, in order to better and enlarge his Estate, the Court would take the custody of the deeds [e].

All Persons concerned in the Title Deeds, ought, in these cases, to be made Parties [f].

A *Jointress* will not be compelled to bring her Jointure Deed into Court or before a Master, unless, the Party requiring it, will confirm her Jointure; but the Court will direct her to deliver in a Schedule of the Deeds, and the Court, at its discretion, will order what shall or shall not be produced [g]. If a Bill be filed against her to have deeds delivered up, without an offer to confirm her Jointure, she may plead the Settlement in bar [h].

With respect to the *delivering up of specific Chattels*, it has been holden, that such a Bill will

[c] Bowles v. Steward, 1 Sch. and Lefr. 223; and see 1 Ves. jun. 76. 8 Ves. 320.

[d] Lord Lempster against Lord Pomfret, Ambl. 154.

[e] Pyncent v. Pyncent, 3 Atk. 571.

[f] Ib.

[g] Petre v. Petre, 3 Atk. 511. Pyncent v. Pyncent, 3 Atk. 571; and see Ford v. Peering, 1 Ves. jun. 76. Senhouse v. Earl, 2 Ves. 450.

[h] Chamberlain v. Knapp, 1 Atk. 52.

lie, in some cases, for the delivery of a specific chattel, to which the Plaintiff is entitled [i], and where the object of the suit is not liable to a compensation in damages [k]; as in the case of the *Pusey Horn* [l], and of an *old* silver *Altar Piece* [m]; a *silver Tobacco Box*, belonging to a club [n]; a *Cherrystone* finely engraved; an extraordinary piece of wrought plate [o], and cases of that description [p].

In Trover, the value of the deeds is recoverable; in *Detinue*, the Judgment is for the Deeds, *or* the value: and it is the Imperfection of the Law in such actions, that seems to be the ground of the Jurisdiction in Chancery for the *specific delivery* of the thing itself [q].

13. *Bills to enforce Contribution.*

Actions between Partners, to enforce a Contribution, have been frequent of late, but formerly that was always effected by a Bill in Equity; and a Bill, it seems, for that purpose, may still be brought [r].

One surety may compel another in Equity, (and this though he be a supplemental surety [s],) to *contribute* towards payment of a debt for which

[i] See Nutbrowne v. Thornton, 10 Ves. 163. S. C. M. S.

[k] See Fells v. Read, 3 Ves. 71.

[l] Pusey v. Pusey, 1 Vern. 273.

[m] See Duke of Somerset v. Cookson, 3 P. Wms. 389.

[n] Fells v. Read, 3 Ves. 71.

[o] Pearne v. Listle, Ambl. 77.

[p] See Lloyd v. Loaring, 6 Ves. 773. and Lowther v. Lowther, 13 Ves. 95.

[q] Vid. Wallwyn v. Lee, 9 Ves. 33.

[r] Wright v. Hunter, 5 Ves. 792.

[s] Cook's Case, 2 Freem. 97.

they were jointly bound[t]; for though the *principal* is to discharge all the obligations of all the sureties [v], yet they stand with regard to each other in a Relation which gives rise to this right, among others, that if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion, which in all events he is to pay[w]; but, where any act has been done by the obligee, that may injure the surety, the Court is very glad to lay hold of it in his favor[x], and will in such case, if called upon, decree a perpetual Injunction, to restrain the holder of the security from suing upon it[y].

If, therefore, the holder of the Security *gives time*[z], accepts a *composition*, or *discharges* the Estate of the Principal, without previous notice to the Sureties, and a reserve of the remedies against them, they will stand discharged[a]; but the discharge of one surety, does not discharge a Co-surety [b].

[t] Toth. 14. 1 Ch. Rep. 34. 1 Eq. C. Abr. 114. case 9; and see Lloyd v. Mackworth, Bunb. 138. Collins v. Griffith, 2 P. Wms. 314.

[v] See on this head Tynt v. Tynt, 2 P. Wms. 541.

[w] Ex parte Gifford, 6 Ves. 808.

[x] Law v. East India Company, 4 Ves. 833.

[y] Nisbit against Smith, 2 Bro. C. C. 583.

[z] Skip v. Huey, 3 Atk. 91. 6 Ves. 809. note a. Rees v. Berrington, 2 Ves. jun. 540. Nisbit against Smith, 2 Bro. C. C. 579. and see 6 Ves. 809.

[a] Ex parte Smith, 3 Bro. C. C. 1. Ex parte Gifford, 6 Ves. 807. Rees v. Berrington, 2 Ves. jun. 543,4. Wright v. Simpson, 6 Ves. 734. Law v. East India Company, 4 Ves. 824. Boulbee v. Stubbs, 18 Ves. 20.

[b] Ex parte Gifford, 6 Ves. 805.

If A. is bound for B. and has a Counterbond, B. may be compelled, in Equity, to pay the debt, though A. is not sued [c].

Contribution has been decreed between the *Joint and separate* Estates of a Bankrupt; the former having paid beyond its proportion, a debt to the Crown, under an Extent, the Bankrupts being jointly and separately bound [d].

Contribution has also been enforced among Assignees in Bankruptcy, to reimburse a payment by one, under an order, for a Loss, occasioned by their joint Act [e].

Where entire damages are recovered against several Defendants *guilty of a Tort*, a Court of Justice will not interfere to enforce Contribution, among the wrong doers: but the non-performance of a Civil obligation is not considered as a Tort [f].

If a Ship be pledged abroad by the Master for Expences, as it may be, the part-owners are liable and compellable to contribute [g].

So, where goods are thrown overboard for the safety of a Ship, a right to *Contribution* arises; and in cases of dispute, the Contribution may be recovered, either by a Suit in Equity, or an Action at Law [h].

On the same principle, if a *Rent-charge* is

[c] Sie dict. Ranelaugh v. Hays, 1 Vern. 190.

[d] Rogers v. Mackenzie, 4 Ves. 752.

[e] Lingard v. Bromley, 18 Ves. 114.

[f] Ib. p. 116, 117.

[g] Samsun v. Bragington, 1 Ves. 443.

[h] Abbott on Shipping, 373; and see Hallett v. Bousfield, 18 Ves. 187. Shepherd v. Wright, Sho. Parl. Cas. 18.

granted by *A.* out of all his Lands, and he afterwards sells the Lands by Parcels to divers persons, the Grantee of the Rent may be restrained from levying the whole Rent upon one of the Purchasers[i].

It is a Rule, that the *Tenant for Life* shall keep down *Interest* by the Rents and Profits; but that Portions, or the *Principal Money* due upon any other Incumbrance shall be borne by the *whole Estate*[k].

If therefore there be a *Tenant for Life* in possession of an Estate subject to a Mortgage, and he omits to keep down the Interest due on the Mortgage, out of the Rents and Profits, the *Reversioner* may file a Bill to make the Rents amenable, and compel the Tenant for Life to answer for what has accrued due[l]. A *Tenant by* the *Curtesy*, is considered as Tenant for Life[m]. And though the Owner of a charge on an Estate, lets it run in arrear several years, it will not be presumed to be released, or intended to prejudice the remainder-man[n].

If, by *Act of Parliament*, there be a *Tenancy in Tail unbarrable*, the Tenant in Tail will be compelled to keep down the Interest, because it is a *fraud* not to keep it down[o]; but otherwise, a

[i] Cary 3. S. C. 1 Eq. Cas. Abr. 33.

[k] Saville v. Saville, 2 Atk. 463. S. C. Select Cas. 32.

[l] Lord Penhryn v. Hughes, 5 Ves. 106; and see Jennings v. Looks, 2 P. Wms. 278.

[m] Casborne v. Scarfe, 1 Atk. 606.

[n] Aston v. Aston, 1 Ves. 267.

[o] Countess of Shrewsbury v. Earl of Shrewsbury, 3 Bro. C. C. 126.

Tenant in Tail is not obliged to keep down Interest on a Mortgage [p], unless he be an Infant [q]; but if the Tenant in Tail pays the Interest, the personal Representatives of that Tenant in Tail cannot come upon the owner of the Reversion for a satisfaction [r].

The Tenant for Life must apply the Rents and Profits during the Estate for Life, in the reduction of any Interest accrued *prior* as well as *subsequent* to the commencement of that Estate [s]. The old rule calling upon the Tenant for Life to pay a gross sum, is not now in force [t]. If a Mortgagee permits a Tenant for Life to run in arrear for the Interest, and purchases the Estate for Life, and takes possession under that purchase, he is bound to apply the surplus rents and profits beyond the current Interest, in discharge of the arrear [v].

The taker of two funds, one productive and the other unproductive, must keep down the Interest of the charges upon them, and pay off the accrued Interest out of the Rents and Profits of the Reversion, before he can take any benefit of the Devise, and cannot throw the charge on the Reversion [w]. Though the Tenant for Life omits

[p] Chaplin v. Chaplin, 3 P. Wms. 235.

[q] See Amesbury v. Browne, 1 Ves. 480, Sarjeson v. Cruise, mentioned 1 Ves. 478.

[r] 1 Ves. 481. Redington v. Redington, 1 Ball and Beatty, 143.

[s] Lord Penhryn v. Hughes, 5 Ves. 106,7. Tracey against Marquis of Hereford, 2 Bro. C. C. 128.

[t] Lord Penhryn v. Hughes, 5 Ves. 107.

[v] Ib. p. 99.

[w] Tracey against Visc. Hereford, 2 Bro. C. C. 128.

to keep down the Interest, yet as between the Mortgagee and the Estate, the Mortgagee has a right to be paid out of the Estate, into whatsoever hands it may come [x].

A Tenant for Life, paying off an Incumbrance will not be presumed to mean to exonerate the Estate [y]: nor is it necessary for him, in order to keep alive a charge against the Estate, to take any Assignment from the Creditors [z]. But although the presumption is, that a Tenant for Life by paying off an Incumbrance upon the Estate, did not mean thereby to exonerate the Estate, such presumption may be rebutted and disproved by Evidence [a].

If a Lease for years from a College be limited by Will to persons in succession, the Remainder-man may oblige the first taker to renew, and contribute to the Fine paid on such renewal [b].

If there be a Lease for Lives from a Church or a College, and the Life of the Devisee, or Grantee for Life, is one of the Lives upon which the Lease is held, and it is a devise of the legal Estate, the Tenant for Life will not be compelled to contribute to a renewal, because his Interest is only for Life, and that Life is in the Lease, and the fine and charges of renewal must be paid by the Remainder-man. This is so in the case of a devise

[x] Lord Penhryn v. Hughes, 5 Ves. 106.

[y] Redington v. Redington, 1 Ball and Beatty, 140.

[z] Ib. 142.

[a] Ib.

[b] See Lock and Lock, 2 Vern. 666.

of a legal Estate, and it seems it would be the same in regard to a *Cestui que trust.* But where the Lives are all *strangers* to the Tenant for Life, there the Tenant for Life must contribute together with those who have a chance in the benefit of the succession provided for by the Will [c].

Sometimes the nature of the Estate bequeathed, or the Will of the Testator, compels a renewal [a]; but where there is no such custom or direction, it is in the discretion of the Tenant for Life to renew or not [b]. But where such a Tenant has renewed, there the Court has said, that the Estate given him being from its nature capable of renewing, the Tenant for Life in renewing for his own use, would be taking an unconscientious benefit of the Estate. The Court therefore thought of an *apportionment*, and that so much as the Tenant for Life took for himself he should pay for; so much as he took for the benefit of another, he should be paid for by that other [c].

The old, absurd, Rule [d] of throwing *one third* of the fine for Renewal, upon the Tenant for Life, does not now prevail; but the Rule now seems to be, that the Tenant for Life contributes only in proportion to the benefit he takes, which always depends much upon his age [e].

[c] Verney v. Verney, 1 Ves. 429, 430. Wilson against Dennison, Ambl. 88.

[a] As in Stone against Theed, 2 Bro. C. C. 248.

[b] Nightingale v. Lawson, 1 Bro. C. C. 443; and see 2 Bro. C. C. 248.

[c] Stone against Theed, 2 Bro. C. C. 248.

[d] Supposed to be established in Verney v. Verney, 1 Ves. 428. Ambl. 88.

[e] Nightingale v. Lawson, 1 Bro. C. C. 440. White v. White, 4 Ves. 24. on Rehearing, 5 Ves. 554. and on Appeal, 9 Ves. 554.

14. *Bills for Dower, or a Partition.*

There have been doubts as to the Principle on which Equity at first interfered in cases of Dower; but so early as in the Reign of Elizabeth, proceedings in Equity for the Recovery of Dower, appear to have been permitted [f].

Dower is a mere *legal demand*, and it is the difficulty under which a Widow labours at Law, from not being able to ascertain the Lands out of which she is dowable [g], or the Persons against whom to bring her Writ [h], and from the embarrassments occasioned by outstanding Terms, that entitles her to equitable relief. The Law gives her Dower out of the Estates of her Husband, and the mesne profits from his death: and if she proceeds at Law, and there should appear to be any Mortgage, or terms of years in her way, she would lose her Costs. The Heir has all the Title Deeds in his hands, and knows what the Estates are: his conscience therefore is affected, and hence, it seems, Equity interposes [i], and, so usefully, that Writs of Dower are seldom brought [k].

In Equity, as at Law, there is no limitation to a claim of the *arrears* of Dower [l], and though at *Law* by the Death of the Heir, the Widow loses all arrears incurred in his Life-time [m], yet in

[f] Wild v. Wells, 1 Dick. 3.
[g] Dormer v. Fortescue, 3 Atk. 130.
[h] Manaton v. Squire, 2 Freem. 26.
[i] See on this subject, Mitford's Pleadings, 110, 111. Curtis v. Curtis, 2 Bro. C. C. 631. etc.
[k] Munday v. Munday, 2 Ves. Jun. 128.
[l] 9 Ves. 222.
[m] Mordaunt v. Thorold, 3 Lev. 375.

Equity, if she has filed her Bill before the death of the Heir, she is entitled to the Mesne Profits[n], from the time her Title accrued[o], provided she has made an *Entry*[p]; and so, in case of her death, are her Representatives[q].

Proceedings to obtain a *Partition* of Estates are also of frequent occurrence.

The Jurisdiction in cases of Partition appears to have arisen in consequence of the Act, (32 Hen. VIII.) which makes one Tenant in common accountable to the other, so that since the Statute, they are become as it were Trustees the one to the other[r].

The earliest instance, however, of a Bill for *Partition*[s], is thought to be in the time of *Elizabeth*[t]. In the Reign of *James II.* they were become frequent[v]; and in that of his Successor, the Chancellor observed, "he did no more question the Jurisdiction of the Chancellor in these cases than he did, whether a gift to a Man and his Heirs were a Fee-simple[w]."

Proceedings to obtain a Partition of Estates may be referred to this head, since a Court of Equity issues a Commission of *Partition*, on account of the extreme difficulty attending the process of Partition at Law, where the Plaintiff must prove his Title as he declares; and also the

[n] Curtis v. Curtis, 2 Bro. C. C. 620.

[o] Dormer v. Fortescue, 3 Atk. 130.

[p] Tilly v. Bridge, 2 Vern. 519. S. C. Prec. in Ch. 252.

[q] Wakefield v. Child, mentioned, 1 Fonb. Eq. p. 158. *in n.*

[r] Sic. dict. arg. 1 Vern. 421.

[s] Harg. Co. Litt. 169[a].

[t] See Tothill's Transactions of Chancery, tit. Partition.

[v] 1 Vern. 421. 2 Ch. Ca. 189.

[w] Manaton v. Squire, 2 Freem. 26.

Titles of the Defendants, and Judgment is given for Partition according to the respective Titles so proved. That is attended with so much difficulty, that by analogy to the Jurisdiction of a Court of Equity, in the case of *Dower*, a Partition may be obtained by Bill[x]. And a commission so obtained, is much more convenient than the Writ ; the valuation of the proportions is better considered, and the Interests of all parties much better attended to[y].

It has been said, that a Decree for a *Partition* is a matter *of right*, and that there is no instance of not succeeding in it, but where there is not proof of Title in the Plaintiff[z]; but on the other hand it has been observed, that as a Plaintiff has a legal Title, it is considered as discretionary in the Court, whether they will grant a Partition or not ; and where there are suspicious circumstances in the Plaintiff's Title, the Court will leave the Party to Law[a]. The Plaintiff must, it appears, state upon the Record his own Title to a Moiety[b], and the Titles of the Defendants ; and with the view to enable the Plaintiff to obtain a Judgment for Partition, the Court will direct inquiries to ascertain who are, together with him, entitled to the whole subject[c].

On a Partition, *every part* of the Estate need not be divided. If there be three houses, it would not be right to divide every house, for that would

[x] Agar v. Fairfax, 17 Ves. Jun. 552.

[y] Calmady v. Calmady, 2 Ves. Jun. 570. Mitford's Pleadings, 110.

[z] Parker against Gerard, Ambl. 236.

[a] Cartwright v. Pulteney, 2 Atk. 380 ; and see Scott and Fawcett, 1 Dick. 299. and Baring v. Nash, 1 Ves. and Bea. 556, 7.

[b] Cartwright v. Pulteney, 2 Atk. 380.

[c] Agar v. Fairfax, 17 Ves. 552. Calmady v. Calmady, 2 Ves. Jun. 570.

be to spoil them; but some recompence is to be made, either by a Sum of Money, or Rent for owelty of Partition to those that have the houses of least value[a].

If, however, there be but one house, there may be a decree for the *Partition* of the same, though highly inconvenient[e]; and where exceptions were taken to the Report of Commissioners for the Partition of a House among Jointenants, one party complaining that she could not get to her division, except up stairs, which stairs were allotted to another Person, the Chancellor would not interfere[f]; and where the Bill was for a Partition of a *Cold Bath*, it was decreed[g]. So it is if there be but one *Mill* or *Advowson*[h] to be divided; but it is different where there are other Lands which may make up the share[i].

It is no objection to a *Partition*, that other persons may come *in esse* and be entitled: otherwise, in every case, where there is a settled Estate with remainders to persons who may come *in esse*, there never could be a Partition[k].

An *Infant* Joint-tenant may file a Bill for a Partition, or such a Bill may be filed against him[l], and it will be decreed; but the Conveyance will be respited till the Infant is of age[m]. A Bill for a Partition may be sustained on behalf of a Joint-

[d] Clarendon v. Hornby, 1 P. Wms. 446.

[e] Turner v. Morgan, 11 Ves. 143. and see 1 P. Wms. 447.

[f] Anon. MS.

[g] Warner against Raynes, Ambl. 559. S. C. alluded to in Parker against Gerard, Ambl. 236.

[h] As to Partitions of an Advowson see Bodicoate v. Steers, 1 Dick. 69. Matthews v. Bishop of Bath and Wells, 2 Dick. 652.

[i] Turner v. Morgan, 11 Ves. 143. and see 1 P. Wms. 447.

[k] Wills v. Slade, 6 Ves. 498.

[l] Tucktield against Buller, Ambl. 197. S. C. 1 Dick. 240.

[m] Lord Brook v. Lord Hertford, 2 P. Wms. 518. Ambl. 197. S. C. 1 Dick. 240.

tenant of a Lease *for years*, nor in such case, is the Reversioner a necessary Party[m]. And a Bill for a Partition of *Tithes* will lie[n]; but the Court has no Jurisdiction to grant a commission of Partition, between Tenants in common of a *Copyhold*[o].

Under a commission of Partition to four Commissioners, and two different returns made, one, by two of the Commissioners, and another, by the remaining two, the Court cannot act; but will grant another commission directed to *five* Commissioners[p]. In cases of this kind, the proper mode is to move to quash the returns[q].

With respect to *Costs* in cases of Partition it is said to have been determined, that where the Plaintiff was entitled to three or four hundred Acres, and the Defendant to four or five only; and though the Defendant would have rather given up his part than be at the expence of a Partition, yet it was decreed, and to be at the *equal* expence of both parties[r]! This unreasonable doctrine seems not now adhered to: the Rule now, seems to be that, in cases of *Partition*, no costs are given until the Commission; and that the costs of issuing, executing, and confirming the Commission are borne by the Parties, in proportion to the value of their respective Interests, and no costs allowed of the subsequent Proceedings[s].

[m] Baring v. Nash, 1 Ves. and Bea. 551.

[n] Baxter v. Knollys, 1 Ves. 495.

[o] Scott v. Fawcett, 1 Dick. 299.

[p] Watson v. Duke of Northumberland, 11 Ves. 153.

[q] Ib.

[r] Parker against Gerard. Ambl. 237.

[s] Agar v. Fairfax, 17 Ves. 558. Calmady v. Calmady. S. C. MS. and see Corbett v. Davenant, 2 Bro. C. C. 252.

15. *Bills to establish a Modus.*

A Bill to *establish a Modus*, in the nature of a Cross Bill, against a demand for Tithes; for a Person is not allowed to file a Bill to establish a *Modus*, unless he has been actually disturbed by Proceedings at Law, in Equity, or in the Ecclesiastical Court[t]. And the Bill must set out the Modus sought to be established, *with certainty*, or the Bill will be dismissed[v].

It seems doubtful whether *occupiers* only, and not owners, can have a decree for establishing payments in lieu of Tythes[w], there being only one case of that description[x].

A Lessee of a Rectory who has made a derivative Lease may bring a Bill for Tythe in kind, and to establish a custom of setting out Corn in Stacks, and may make the person who is entitled to the Inheritance, a party, notwithstanding the Tythes themselves were out in Lease at the time for which the Account is prayed; for otherwise it might introduce great inconveniences by a collusion between the Lessees and the occupiers[y].

16. *Bills to marshal Securities.*

It has been held, that if a Party has two Funds by which his Debt is secured, a Person having an Interest in one Fund only has a right in

2 Ves. Jun. 568; and see Metcalf v. Beckwith, 2 P. Wms. 377, 8. Baring v. Nash, 1 Ves. and Bea. 554.

[t] Gordon v. Simpkinson, 11 Ves. 510. Lord Coventry v. Burslem, 2 Anst. 567. n. 4 Gwill. Tyth. 1596.

[v] Ekins v. Dormer, 3 Atk. 534.

[w] Vid. Warden, &c. of St. Paul's v. Morris, 13 Ves. 163.

[x] Canons of St. Paul's v. Crickett, 2 Ves. Jun. 563.

[y] Hayter v. Stapilton, 2 Atk. 136.

Equity to compel the former to resort to the other fund, if that is necessary for the satisfaction of both. If therefore *A.* has two Mortgages, and *B.* has one, *B.* has a right to throw *A.* upon the Security which *B.* cannot touch [z].

So, where in Bankruptcy the Crown by Extent lays hold of all the Property, even against Creditors, the Crown has been confined to such property as would leave the Securities of Incumbrancers effectual [a].

In a case where the Loyalist Estates in *America*, were, under the forfeiting Acts, to be sold for the payment of debts, this was held not to be a ground for an Injunction to restrain an Action here on a Bond [b].

But though, if two Funds of a Debtor are liable to one Creditor, and only one Fund to another, the former shall be thrown upon that Fund, to which the other cannot resort, in order that he may avail himself of his only Security, where that can be done without Injustice to the Debtor or the Creditor, yet that principle has never been pressed to the effect of Injustice to the common Debtor. Much less, have persons who are not common Creditors of the same Debtor, a right to compel the Creditors of both Funds to resort to the one, in order to leave a larger dividend for those who can claim against the other [c].

Marshalling of Assets, are considered elsewhere.

[z] Lanoy v. Duke and Duchess of Atholl, 2 Atk. 446; see Aldrich v. Cooper and others, 8 Ves. 388. 395.

[a] Ib.

[b] Kempe against Antill, 2 Bro. C. C. 11.

[c] Exparte Kendall, 17 Ves. 527.

Having considered the Cases in which a Court of Equity interferes to *prevent Fraud*, we now proceed to the consideration of those cases, where Equity remedies Fraud which has been committed. Judges have never ventured to lay down as a general proposition what constitutes Fraud[d]; nor can any invariable Rule be established. Fraud is infinite, and were a Court of Equity to lay down Rules, how far they would go in extending relief against it, or to define strictly the species of Evidence of it, the Jurisdiction would be crampt and perpetually eluded by new schemes, which the fertility of Man's Invention would contrive[e].

All Frauds are cognizable in one or other of the Courts of Justice. Some are of such turpitude, that the Criminal Courts only have Jurisdiction over them; for Courts of Equity do not affect to consider Fraud in the light of a Crime: It is not their province to punish[f]; nor have they a censorial Authority: they interfere in Cases of Fraud in a *civil*, and not a *criminal* point of view. The Court of Star Chamber not only gave the same Relief as Courts of Equity now do, in Cases of Fraud, but also *punished* the fraudulent Defendant; and it was the ancient course of the Court of Chancery in cases of notorious Frauds, to decree a Defendant to pay *exemplary* costs; but that practice,

[d] See Mortlock v. Buller, 10 Ves. 306, 7.

[e] See Lord Hardwicke's Letter to Lord Kaimes, 1 vol. Life of Lord Kaimes, 237; and see what is said to the same effect, in Lawley v. Hooper, 3 Atk. 278.

[f] See Waltham v. Broughton, 2 Atk. 43.

owing to the difficulty of carrying it into Execution, has long since been superseded.

Fraud, has been defined tobe, *any kind of Artifice by which another is deceived* [g]: all surprize, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as Fraud. *Collusion* in a Court of Equity is considered as Fraud [h]. And it is worthy of remembrance, that in all cases of Fraud, the remedy does not die with the Person; but the same relief may be obtained against the *Executor* of the Person committing the Fraud [i]: nor can the statute of Limitations be pleaded to a Bill for the discovery of a Fraud [k], length of time forming no Bar [l]. "*No length of time*," as Lord Erskine has more than once emphatically observed, "*can prevent the unkennelling of Fraud* [m]." But this general proposition admits of some qualification; for where the Fraud is committed a considerable time back, the Bill ought to state that, it *was discovered within* six years before the Bill was filed [n]; or a waiver of the objection as to length of time should appear on

[g] See Pothier Traite des Obligations, Partie 1. chap. 1. s. 1. Art. 3. s. 3.

[h] Garth v. Cotton, 3 Atkyns, 757.

[i] Garth and Cotton, 3 Atk. 757. and the decree to that effect, ib. p. 758.

[k] Bicknell v. Gough, 3 Atk. 558.

[l] Pickering and Lord Stamford, 2 Ves. Jun. 280.

[m] MS. See also Cottrell v. Purchase, Forester 66. and S. C. in MS. Bacon's Tracts, p. 37. 1 Ves. Jun. 160, 328. and see Pickering v. LordStamford, 2 Ves. 280.

[n] Purcel and Macnamara, 14 Ves. 91. South Sea Company v. Wymondsell, 3 P. Wms. 243. see also Dougl. 630. and what is said in Gifford and Hort, 1 vol. Scho. and Le Froy, Rep. 406. and in Medlicott v. O'Donnell, 1 Ball and Beatty, 166.

the face of the proceeding [o]. Length of time always forms a strong objection where it can be used to shew *acquiescence;* but in no other way. In the case of a Steward keeping his Accounts in a fraudulent manner, it has expressly been said, "there can be no period, however remote, through which the Court will not look for the purpose of setting such an Account right [p]."

But even in a case of *gross fraud* the Court will not decree an Account after a considerable length of time, against Executors, Legatees and innocent Persons, claiming under the fraudulent party [q].

In all cases of *Fraud* which is not penal, a Court of Equity has a concurrent Jurisdiction, with Courts of Law [r], with the exception as to *Fraud in obtaining a Will*, which, where it relates to Real Estate, is always referred to the consideration of a Court of Law, in the shape of an Issue *devisavit vel non* [s]; and if of personal Estate, is exclusively decided upon in the Spiritual Court [t], where Parties may be examined by way of allegation touching the Fraud [v]; though it has often been lamented, that a Court of Equity cannot take cognizance of Fraud as to Wills of personal Estate [w].

[o] Picket v. Loggon, 14 Ves. 244.

[p] Earl of Hardwicke v. Vernon, 14 Ves. 511.

[q] Doleraine v. Browne, 3 Bro. C. C. 633; and see Hercy v. Dinwoody, 2 Ves. Jun. 92.

[r] Colt v. Woolaston, 2 P. Wms. 136. Bright v. Eynon, 1 Bur. 395, 4 Inst. 84.

[s] Powis v. Andrews, 2 Bro. P. C. 476. Bates v. Graves, 2 Ves. jun. 208.

[t] Kerrick v. Barnsby, 7 Bro. P. C. 449. Toml. Edit; and see Archer v. Mosse, 2 Vern. 8.

[v] Stephenson v. Gardener, 2 P. Wms. 286.

[w] Ex parte Fearon, 5 Ves. 647.

Every question concerning the *Execution* and *validity* of a Will under which any *legal* or *equitable* Estate in Land is claimed, is properly and only triable at Law; nor do Courts of Equity establish a Will by which a *Trust* only is devised, without a Trial, if desired [x]. The Court will not, in any case, set aside a Will, without directing an Issue [y].

If, therefore, a Bill be filed to set aside a Will for Fraud, and for a Receiver, the Defendant may plead that the Will was duly executed, and that it ought to prevail, till upon an Issue at Law it should be found to be otherwise; but the Plea cannot be extended to the Receiver, for the Court will not suffer its hands to be tied up, if in the progress of the Cause it should be necessary to appoint a Receiver [z].

But though a Will of personal Estate proved in the Spiritual Court, cannot, though obtained by Fraud, be controverted in Equity yet if a Party claiming under such a Will comes for any aid in Equity, it will not be granted him [a].

And in some cases, it seems, a Will, though good at Law, may be set aside in Equity for *Fraud:* as if *A.* should agree to give *B.* Bank Bills to the amount of £1000, in consideration that *B.* should devise his Lands to *A.*, and accordingly *B.* does make such a Will, and *A.* gives

[x] Vid. what is said Arg. 7 vol. Bro. P. C. 449. Ed. Toml.

[y] Bates v. Graves, 2 Ves. Jun. p. 288.

[z] Anon. 3 Atk. 17.

[a] Nelson v. Oldfield, 2 Vern. 76.

B. the Bank Bills, but those Bank Bills prove to be forged, this though a good Will at Law, may nevertheless be avoided in Equity by the Testator's Heir, for the Fraud [b].

Previous to the consideration of cases of Fraud, it is proper to advert to some Rules laid down upon the subject.

1. The Rule of *Law* as to Fraud, is considered as a good Rule in *Equity*, (viz.) that Fraud is never to be presumed; but that may be a Fraud in Equity, which is not so at Law [a].

2. If the *Principal* in a Fraud be *released*, Parties who would have been *secondarily* liable, cannot be proceeded against [b].

3. A Deed cannot be set aside *in part* for Fraud. If set aside at all, it must be, *in toto* [c]; and if obtained by Fraud, it will be set aside *in toto*, though innocent Persons are interested under it [d].

Solemn Conveyances, Releases and Agreements made by Parties will not be set aside on slight grounds [e]; but whenever *Suppressio veri* or *Suggestio falsi* occur, and more especially both together, they afford a sufficient ground for setting aside any Release or Conveyance [f].

[b] Goss v. Tracy, 1 P. Wms. 288. S. C. 2 Vern. 700.

[a] Trenchard v. Wanley, 2 P. Wms. 166; and see Townshend v. Lowfield, 3 Atk. 536. Sed Vid. Earl of Chesterfield v. Janson, 1 Atk. 351, 2. where it is said there may be presumptive fraud.

[b] Thompson against Harrison, 2 Bro. C. C. 164.

[c] See Myddleton v. Lord Kenyon, 2 Ves. jun. 408. Lawley v. Hooper, 3 Atk. 281.

[d] Davidson v. Russell, 2 Dick. 761. Worseley v. De Mattos, 1 Bur. 474. Huguenin and Baseley, 14 Ves. 273.

[e] 1 P. Wms. 727. 1 Atk. 10. 1 Ves. 19. 2 Atk. 592.

[f] See Jervis v. Duke, 1 Vern. 19. Broderick v. Broderick,

If any Instrument is obtained from Persons ignorant of their Rights, but whose Rights are known to the Party obtaining the Instrument, a Court of Equity will relieve [g]. Courts have even gone farther, and have set aside Instruments obtained from Parties, ignorant of their Rights, although no Fraud or Imposition has been practised [h].

An Agreement for a Lease, founded on a fraudulent statement, will be rescinded, and an account directed between the Parties [i].

If, indeed, a Man upon a Treaty for any Contract, makes a *false representation*, whether knowingly, or not [k], by means of which, he puts the Party bargaining, under a mistake upon the Terms of Bargain, it is a Fraud, and relievable in Equity [l].

If a Person, under the influence of mistake, builds on another person's ground, that person seeing the Building, and not interfering to put the party on his guard, such suppression of the truth, *suppressio veri*, *is fraudulent*, and a Court of Equity will give relief [m]. But there does not

1 P. Wms. 239. Cann v. Cann, 2 P. Wms. 727. Bowles v. Stewart, 1 Sch. and Lefr. 209.

[g] Broderick and Broderick, 1 P. Wms. 239. and the cases referred to in the note.

[h] Evans against Lewellyn, 2 Bro. C. C. 150.

[i] Long v. Fletcher, 2 Eq. Abr. 5.

[k] Anslie v. Medlycot, 9 Ves. 21: and see Graves v. White, Freem. 57. Scott v. Scott, mentioned arg. 3 Ves. 458.

[l] Neville against Wilkinson, 1 Bro. C. C. 546. Evans v. Bicknell, 6 Ves. 174, 183. Burroughs and Lock, 10 Ves. 475. De Manneville v. Crompton, 1 Ves. and Bea. 355, 6.

[m] Pelling and Armitage, 12 Ves. 85; See also 2 Atk.

appear to be any Case, in which a Lessee either of a Term, or from year to year, making any improvement upon the Estate in his Possession, though with the complete knowledge of the Landlord, has been held entitled as against that Landlord, to have his Lease prolonged until he shall obtain reimbursement for the Improvements he has made[n].

If a Landlord, knowing the Tenant's Lease to be bad, stands by, and allows him to make improvements on the faith of the supposed goodness of his Lease, in such case, it seems, Equity would relieve[o].

So, too, where *A.* being Tenant in Tail, remainder to his brother *B.* in tail, *A.* not knowing of the entail, makes a settlement on his wife for life for her jointure, without levying a fine, or suffering a recovery, which *B.* who knew of the entail engrosses, but does not mention any thing of the entail, because, as he confessed in his answer, if he had spoken any thing of it, his Brother, by a recovery, might have cut off the remainder, and barred him; although after the death of *A.*, *B.* recovered in Ejectment against the Widow by force of the entail; yet she was relieved in Chancery, and a perpetual Injunction granted, for this Fraud in *B.* in concealing the entail; since, had it been disclosed, the settlement might have been made good by a recovery[p].

82. East India Company v. Vincent; and see Dann v. Spurrier, 7 Ves. 231.

[n] 12 Ves. 85.; but see 7 Ves. 231.

[o] Pelling and Armitage, 12 Ves. 85.

[p] 3 Bacon's Abr. 299.

So, where one made his Will, and his Wife Executrix, and his Son afterwards prevailed on his Mother to get the Father to make a new Will, and to name him Executor, he promising to be a Trustee only for his Mother; this was considered a Fraud, and the Son held to be accountable as a Trustee [q].

So, too, there are various cases where a person standing by, and by silence contributing to a Fraud, has been compelled to remedy the mischief his fraudulent silence has occasioned [r].

Upon this ground it is, that a Landlord has been restrained from cutting ornamental trees in a Lawn during the Term, his conduct amounting to a consent to the Tenant's plan of Improvement, laying out the Lawn, &c. [s]

If a Conveyance by *Lease and Release*, or *Bargain* and *Sale*, has been obtained by means, which in a Court of Equity have the character of Imposition, Fraud, Oppression, or undue Advantage, which, indeed, may all be comprehended under the general term, Fraud, a Fine, constituting part of that Conveyance which is so affected, whatever may be the effect at Law, is no bar to

[q] Thyne v. Thyne, 1 Vern. 296; and see also other cases determined on the same principle, as Mead and Webb, 4 Bro. P. C. 497. a case between Lessor and Lessee as to a suppression of amount of Land demised. Ramsden and Hylton, 2 Ves. 304. Release held bad on account of the suppression of a Settlement. Beatriff and Smith, Eq. Ca. Abr. 357. Sale of Land and suppression of articles.

[r] See Hunsden v. Cheney, 2 Vern. 150. the concealment of an entail, p. 150. Draper and Borlan, 2 Vern. 370. Concealment of an Incumbrance, Ibbotson and Rhodes, 2 Vern. 554. Concealment of a Mortgage.

[s] Jackson v. Cator, 5 Ves. 688.

relief in Equity. The Person deriving Title under it, is a Trustee; and the species of Relief is, by directing a Reconveyance[t]. If a Contingent Remainder is destroyed by a legal conveyance, and that conveyance is obtained by Fraud, Equity will relieve against it[u]. And so, where a *Fine*, followed by *Non-claim*, was levied by one who got possession under a *forged deed*, a Court of Equity decreed against the fine[v].

Letters Patent, if obtained by Fraud, may be set aside at the suit of the Attorney General[w].

Fraudulent Instruments may be proved to be such, by facts apparent on the face of the Instrument, as well as by extrinsic Evidence. The *consideration* of a Deed may be such as, of itself, to shew the Deed was fraudulently obtained. Allusion has already been made to the case of young *Heirs* and *Reversioners*, and in what manner *inadequacy of consideration* affects Contracts by them[x]. In regard to Persons not standing in those situations, mere Inadequacy of Price, unless it amount to what is termed, *gross inadequacy*, is not a ground for annulling an Agreement, though *executory*, i. e. *to be* performed, if the same appears to have been fairly entered into, and understood by the

[t] Pickett v. Loggon, 14 Ves. 234; see also Wilkinson v. Brayfield, 2 Vern. 307. Baker v. Pritchard, 2 Atk. 390. Barnsley v. Powell, 1 Ves. 289. In Penne v. Peacock, For. 42. it was doubted how far fraud could affect so solemn an act as a Fine; but in the same case in MS. no such doubt appears.

[u] Englefield v. Englefield, 1 Vern. 443, 446.

[v] Cartwright v. Pulteney, 2 Atk. 381.

[w] Attorney Gen. v. Vernon, 1 Vern. 277,370. S. C. 2 Ch. Reports, 353.

[x] Ante, p. 97. &c.

parties, and capable of being specifically performed: still less, does such inadequacy form a ground for rescinding an Agreement *executed*, i. e. actually performed. Lord Chief Baron Eyre, observed, (and in this he has been followed by succeeding Judges,) that, "there was no case where mere Inadequacy of Price, independent of other circumstances, had been held sufficient to set aside a Transaction[x]." A bargain may be hard and unconscionable, and yet valid, unless the Inadequacy of Price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of Fraud in the Transaction.[y].

Whenever an agreement is so extremely inadequate as to satisfy the conscience of the Court, by the amount of the inadequacy, that there must have been imposition, or that species of pressure upon distress, which in the view of a Court of Equity amounts to oppression, the Court will give relief[z]. An Annuity cannot, generally speaking, be set aside for Inadequacy of Price[a]; but

[x] See Griffith v. Spratby, 2 Bro. 180. in n. and so Moth v. Atwood, 5 Ves. 845. and what is said by Lord Erskine in Lowther v. Lowther, 13 Ves. 103.

[y] See Clarkson v. Hanway, 2 P. Wms. 203. Coles and Trecothick, 9 Ves. 246; and see Gibson v. Jeyes, 6 Ves. 273. Crowe v. Ballard, 1 Ves. Jun. 219. Heathcote and Paignon, 2 Bro. C. C. 167; and see How v. Wilden, 2 Ves. 516. Low and Barchard, 8 Ves. 137; and see 10 Ves. 313. and 14 Ves. 240. and what is said by the Master of the Rolls in Burroughs v. Lock, 10 Ves. 474.

[z] Underhill and Horwood, 10 Ves. 219. and so is Heathcote and Paignon, 2 Bro. C. C. 167. Peacock v. Evans, 16 Ves. 517.

[a] Floyer against Sherrard, Ambl. 18. Speed and Phillips, 3 Anst. 752.

if the price be grossly inadequate, it may be set aside[b]. What shall be termed *gross inadequacy*, has not been defined, unless the saying, "what shocks the conscience," be a definition; but where a Sale was for *one half* of the worth, that, it has been said, would be relieved against[c].

The doctrine of the Scotch Law as to *facile Men* does not apply, in its full extent, in England; but wherever a person taking advantage of the *necessities* of another, practices *extortion*, a Court of Equity will decree the Party to refund, and without enquiring into the particular circumstances of the Imposition[d].

Lord Eldon, however, has on this subject put a very strong case. "Suppose," says he, "that A. B. had said, 'Make out your Title as Heirs, I will give no Information or Assistance; but if without doing so, you will take £1000, I will give that sum:' considering the passages that are to be met with in the Judgments of this Court, though a valuable Property had been acquired, to which that sum was very inadequate, I will not say whether such a case would have been reached by the Doctrine of this Court, protecting, upon public principles, persons in distress[e]."

If a Bargain which was fair at the time, becomes, by subsequent events, very advantageous, the

[b] Heathcote and Paignon, 2 Bro. C. C. 167. Lawley v. Hooper, 3 Atk. 278. Underhill v. Horwood, 10 Ves. 219.

[c] Maskeen v. Cote, T. T. 8 Geo. 2. 1733. MS.

[d] Thornhill v. Evans, 2 Atk. 330.

[e] See Pickett v. Loggan, 14 Ves. 240: and see on this subject, Ardglasse v. Muschamp, 1 Vern. 237, 239. Proof v. Hines, Forrester 111.

Vendor cannot make any claim in a Court of Equity on the ground of inadequacy of Price [f]. If, for instance, a Man should contract to sell an Estate for a Life Annuity, and the contract is signed, and the Party to have the Annuity dies before the end of the first half year, the Court would still execute the contract [g].

So, if a Deed be entered into by Parties apprized of their rights, in order to put an end to a Suit, although upon inadequate consideration, it cannot be set aside [h].

In some few instances, as in *Post Obits* [i], Sales of *Reversions* [k], and *Sales by Auction* [l], even gross inadequacy would not, it seems, form a ground of relief.

Nor does the Court ever give relief against Marriage Contracts for Settlements, Jointures, or other Provisions, though they may be very unequal, and in favour of the Wife, because it cannot set the Wife in *statu quo*, or unmarry the Parties, as was said in *Wicherley* v. *Wicherley*, where the Remainder-man brought a Bill to be relieved against a Jointure made by the Tenant for Life, even upon his death-bed, in consideration of and previous to his Marriage, by virtue of

[f] See Batty and Lloyd, 1 Vern. 141. and Gowland and De Faria, 17 Ves. 25.

[g] See 3 Bro. C. C. 605. and Lord Eldon adopts this case in Coles and Trecothick, 9 Ves. 246. Mortimer and Capper, 1 Bro.

[h] Stephens against Lord Visct. Bateman, 1 Bro. C. C. 22.

[i] See Wharton and May, 5 Ves. 27.

[k] Nichols v. Gould, 2 Ves. 422.

[l] White v. Damon, 7 Ves. 35.

a power, reserved to him; but relief was denied[m].

In all these cases it must be remembered, that if a Contract, voidable for inadequacy of consideration, *is confirmed* by the Party, with his Eyes open, it will not be relieved against[n].

Whatever previous determinations there may formerly have been to the contrary[o], it is now fully settled, upon the Statute 27 Eliz. c. 4. a Statute passed to prevent Frauds on Purchasers, that a *voluntary Settlement*, however free from actual Fraud, is, by the operation of that Statute, *deemed* fraudulent, and void, against a *subsequent Purchaser for a valuable consideration*, even where the Purchase has been made, with *notice* of the prior voluntary Settlement. The Statute receives the same construction, and produces the same effect both in Law, and Equity; and a Purchaser of an Equitable Estate for a valuable consideration, though with notice, is no more affected by a voluntary Settlement, than the Purchaser of a legal Estate[p].

"I hardly know an Instance," says *Lord Hardwicke*, "where a voluntary conveyance has not been held fraudulent against a *subsequent Purchaser*[q]." And where a *Power* is executed under

[m] North v. Ansell, 2 P. Wms. 619.

[n] Maskeen v. Cote, Trin. T. 8 Geo. 2. 1733. MSS.

[o] See White v. Stringer, 2 Lev. 105.

[p] Buckle v. Mitchell, 18 Ves. 110. Pulvertoft v. Pulvertoft, 18 Ves. 90. Mitcalfe v. Pulvertoft, 1 Ves. and Bea. 183,4. Otley v. Manning, 9 East. 59. Hill v. Bishop of Exeter, 2 Taunt. 69. Evelyn v. Templar, 2 Bro. C. C. 148. said to be incorrectly reported, 18 Ves. 91. and see Ambl. 288. 1 Eq. Abr. 334.

[q] White v. Sansom, 3 Atk. 412. Sed Vid. Jennings v. Sellick, 1 Vern. 467.

a voluntary settlement, and that Power is afterwards executed for a valuable consideration, the Purchaser will have the benefit of it[r]; but if a Purchase has been made, at an *under value*, it would not, perhaps, invalidate the previous voluntary settlement[s].

If a Man makes a voluntary Conveyance of Land, and the Alienee sells the same for a valuable consideration, the Land is bound[t].

It is observable, that where a voluntary conveyance is afterwards defeated by a Sale for valuable consideration, there is no instance, of a satisfaction being decreed against the maker of the voluntary Conveyance, or his Estate, unless, where there has been some covenant, on which an Action, or Suit might be maintained[v].

Every voluntary conveyance of a Man, *for his own benefit*, is fraudulent against Creditors[w]; but every voluntary conveyance is not fraudulent[x]. A *voluntary Conveyance* of real Estate, or a Chattel Interest, in favor of *a Child*, by one, *not indebted at the time*, though he afterwards becomes indebted, is good, as against *Creditors*, though not against *Purchasers*[y], provided there be no particular evidence, or badge of Fraud, (a power of revocation, for instance[z], or retention of possession[a].)

[r] Hart v. Middlehurst, 3 Atk.

[s] See 1 Ves. and Bea. 183,4.

[t] Sagittary v. Hyde, 2 Vern. 44. S. C. MS. Rogers v. Langham, 1 Sed. 133.

[v] Williamson v. Codrington, 1 Ves. 516.

[w] Fitzer v. Fitzer, 2 Atk. 513.

[x] Sagittary v. Hyde, 2 Vern. 44.

[y] See Russell v. Hammond, 1 Atk. 15,16.

[z] Peacock and Monk, 1 Ves. 132.

[a] Bates v. Graves, 2 Ves. 292. and see Stileman v. Ashdown, 2 Atk. 481; and Lord Banbury's Case, 2 Freem. 8.

If one voluntarily settles his Estate, with a power of revocation, with the consent of J. S. who is his own Relation, or one that may be supposed to be at his command, it is fraudulent within the Statute ; but if it be with the consent of others, who cannot be supposed to consent but upon very good grounds, it is not fraudulent within the Statute [b].

If a Father takes back an Annuity to the value of the Estate comprized in the Settlement, it is considered as tantamount to a continuance in possession, and Creditors will be relieved against such settlement. So, if a Bond or Mortgage, or Conveyance of an Estate is made, to himself and his Wife, making her joint purchaser, obligee, or grantee, so as to entitle her to the survivorship if he dies in her life, yet that is considered as a mere voluntary act with respect to Creditors, and fraudulent, although as between the Wife, and the Heir or Executor, it would prevail [c].

But if one *indebted at the time*, makes a mere voluntary conveyance to a Child, and dies indebted, it is still considered as part of his Estate for the benefit of his Creditors : a Man indebted, conveying voluntarily, being always looked upon as meaning a Fraud on his Creditors [c].

If a Settlement be made after Marriage, in

[b] Lord Banbury's Case, 2 Freem. 8.

[c] Underwood v. Hithcox, 1 Ves. 280.

[c] Lord Townshend v. Wyndham, 2 Ves. 10, 11; and see 1 Atk. 15. and 94. Taylor v. Jones, 2 Atk. 600.

pursuance of a Bond [f], or other Agreement before Marriage [g]; upon payment of Money as a Portion [h]; or a new additional sum of Money; or even upon an Agreement to pay Money, (provided the Money be afterwards paid;) this makes the Settlement good and valuable both at Law and Equity, against Creditors, as well as Purchasers [i], provided there be no Fraud, nor vast inadequacy [k], for some inadequacy is unimportant [l].

A Person *before Marriage*, may settle all his Property upon his intended Wife, even his moveable effects, and the fact of his being indebted at the time, and of her knowing him to be so, will not, even against Creditors, invalidate the Transaction: nor is it necessary that the Husband should receive a Portion with his Wife [m]; for the consideration of Marriage protects the Settlement [n]. And if Real Estate form part of the Settlement, and after the Marriage, the Husband build on the Land, or enfranchise Copyholds included in the Settlement, yet the Creditors cannot have the benefit of these Acts by way of charge against the Wife [o].

So, if a Bond is given on Marriage and receipt

[f] Jason v. Jervis, 1 Vern. 286.

[g] Hylton v. Biscoe, 2 Ves. 308.

[h] Stileman v. Ashdown, 2 Atk. 479. Jones and Marsh, For. 63. S. C. MS. Wheeler against Caryl, Ambl. 121; and see Hilton v. Biscoe, 2 Ves. 308.

[i] Browne v. Jones, 1 Atk. 190. see also ex parte Hall, 1 Ves. and Bea. 112. Prec. Ch. 101, 405.

[k] Ward v. Shallet, 1 Ves. 18.

[l] See Jones v. Marsh, For. 65. S. C. MS.

[m] Browne v. Jones, 1 Atk. 190.

[n] Nairn v. Prowse, 6 Ves. 759. Wheeler against Caryl, Ambl. 121.

[o] Campion v. Cotton, 17 Ves. 271.

of a Portion, conditioned to pay a Sum, beyond the Marriage Portion, in case of death *or insolvency*, such Bond is good, *so far as relates to the Property received with the Wife*, but beyond that, is fraudulent as against Creditors; for no bounds could be set to such agreements: if a Trader could make a provision of that sort to the amount of £1000, he might do so to the amount of £100,000, and take all his property out of the hands of his Creditors [o].

But if a Settlement be made *after Marriage*, (a Marriage in Scotland is sufficient [p],) such Settlement, unless it contains a Provision for Debts [q], or is in pursuance of articles before Marriage [r], is fraudulent [s] against such persons as were Creditors *at the time the Settlement was made* [t]; unless it be a *single debt* [v], or unless the debt be secured by *Mortgage*, in which case it would not affect the Settlement [w]; for to do that, it seems, the Party must have been *insolvent* at the time; but it is observable, that if (with the exceptions alluded to,) there be Creditors at the time of such Settlement, and the Settlement is on that account declared fraudulent, the property so settled, becomes part of the Assets, and all *subsequent* Cre-

[o] Ex parte Meaghan, 1 Sch. and Lefr. 179. and Ex parte Murphy, Ib. p. 44. overruling what is said by Lord Kenyon in Staines v. Plank, 8 T. R. 389.

[p] Ex parte Hall, 18 Ves. 112.

[q] George v. Milbanke, 9 Ves. 104.

[r] Beaumont v. Thorpe, 1 Ves. 27.

[s] See Watts v. Thomas, 2 P. Wms. 304.

[t] Kidney v. Coussmaker, 12 Ves. 155. see Middlecombe v. Marlow, 2 Atk. 520. and White v. Sansom, 3 Atk. 413.

[v] Lush v. Wilkinson, 5 Ves. 387.

[w] Stephens against Olive, 2 Bro. C. C. 30.

ditors are let in to partake of it[x]; and in one case, a *subsequent* Creditor filed, what is called, a *fishing* Bill, in order to prove debts *antecedent* to the Settlement[y], and thus establish a fund for the payment of his own debt.

By the Common Law, fraudulent Gifts or Conveyances were avoidable by Persons who were Creditors at the time such Gift or Conveyance was made; but such Gifts or Conveyances were not avoidable by persons who became Creditors, subsequent to the making of them[z].

And though a *voluntary* Deed, a Bond for instance, is void against Creditors, yet if *arrears* have accrued under such Bond, these will form a valuable consideration; and if a new Bond, or the assignment of a Lease, is given for such arrears, the Deed may be sustained against Creditors[a].

So, in those cases, where Property belonging to the wife, in Trustee's hands, is sought by the Husband, by a Bill in Equity, and the Court directs a Settlement, such Settlement will be good against Creditors[b].

A Widow, it has been holden, may, previous to a second Marriage, make a Settlement in favour

[x] See Taylor v. Jones, 2 Atk. 600; and see what is said of that in Dundas v. Dutens, 1 Ves. Jun. 198. Arg. Mountague and Lord Sandwich, mentioned in note to 12 Ves. p. 156. See also Walker v. Burroughs, 1 Atk. 93.

[y] Lush v. Wilkinson, 5 Ves. 384; and see what is said of that case in Kidney v. Coussmaker, 12 Ves. 155.

[z] Twine's Case, 3 Co. 83. a. Upton and Bassett, Cro. Eliz. 444. Dyer, 294,5.

[a] Gilham v. Locke, 9 Ves. 612. Stiles v. Attorney General, 2 Atk. 152.

[b] Wheeler against Caryl. Ambl. 121.

of the children of the first Marriage, and of the second Marriage; and the same will not be considered a voluntary Settlement, or fraudulent and void as against subsequent Creditors and Purchasers [c].

"There are *dicta*, that a settlement after Marriage, reciting a parol Agreement before Marriage, is not fraudulent against Creditors, provided the parol Agreement had actual existence; but, it does not appear, that the point has been directly decided. It was discussed in *Dundas and Du Tens* [d]; but Lord *Thurlow*, though inclined that it should stand good, said, it was a mere matter of curiosity, if the first point was against the plaintiff, as it was. A case in *Levinz* [e] is there referred to; a *Dictum*, not a Decision, that the Settlement was void; for though a parol promise before Marriage was proved, and a Settlement made after the Marriage, yet it was not made with such a correspondence to the parol promise, as to appear to have been made in execution of it; and therefore it was held that the Court could not connect them, but the Settlement must stand upon its own footing, as a mere Settlement after Marriage [f].

A voluntary Settlement binds the Party making it, nor can he alter it, how much soever he may be inclined to do so, unless there be a power of revocation [g]. "He must lie down under his own

[c] Newstead v. Searles, 1 Atk. 264.
[d] 1 Ves. jun. 196.
[e] 2 Lev. 146.
[f] Randal v. Morgan, 12 Ves. 74.
[g] See Ambl. 266.

folly." It is void only as against Creditors; and only to the extent, in which it may be necessary to deal with the Estate for their satisfaction, it is as if it never had been made. To every other purpose, it is good; satisfy the Creditors, and the Settlement stands[h]. Nor would a subsequent Will, avoid a voluntary Deed, kept by the maker, and never cancelled[i]."

Weakness of mind does not appear to be a sufficient ground to invalidate an Instrument. According to Sir *Joseph Jekyl*, "if a *weak* Man gives a Bond, if there be no Fraud or breach of Trust in the obtaining it, a Court of Equity would not set it aside only for the weakness of the obligor, if he be *compos mentis;* for the Court will not measure the size of People's Understandings or Capacities, there being no such thing as an equitable incapacity where there is a legal Capacity[k]." Lord *Hardwicke*, also, clearly held, that it was not sufficient to set aside an Agreement, to suggest weakness and indiscretion in one of the Parties who had engaged in it; for supposing it to be in fact a very *hard and unconscionable bargain*, yet if a person will enter into it with his eyes open, Equity will not relieve him, unless he can shew Fraud in the Party contracting with him, or some undue means made use of to draw him into such

[h] 12 Ves. 103. 106. Curtis v. Price. Whaley v. Norton, 1 Vern. 483.

[i] Boughton v. Boughton, 1 Atk. 625.

[k] Osmond and Fitzroy, 3 P. Wms. 131. S. C. MS. under the name of Osmyn v. Duke of Cleveland.

an Agreement[l]. Lord *Thurlow*, however, according to some of the Reports, appears not to have concurred in this doctrine, and observed[m], "that in almost every case upon this subject, a principal ingredient was a degree of weakness, *short of legal incapacity;* and that in the case of *Osmond and Fitzroy*, no relief probably would have been given, if the Court had not considered Lord *Southampton* as more liable to Imposition, than the generality of Mankind." It seems, however, that the relief in *Osmond and Fitzroy*, was given, not on the ground of the weakness of the Party, but principally on account of the *relation* in which the Parties stood; the Servant who obtained the Bond in that case, having been originally hired to take care of the young Lord while an Infant, or during his travels, which Trust, the Court thought, continued so long as the servant remained in the service; and, indeed, in the Report of *Griffin and Deveuill* by Mr. *Woodeson,* who was counsel in the cause, it appears that *Lord Thurlow* admitted that the Court would not set aside the voluntary deed of a weak man, who is not *non compos*, nor any Deed of Improvidence or profuseness, for those reasons merely, where no fraud appears, as was laid down by *Sir Joseph Jekyl* in *Osmond* and *Fitzroy;* but he said that, "*Sir Joseph Jekyl* might have been

[l] Willis and Ternegan, 2 Atk. 251: see also Stanhope v. Cope, 2 Atk. 231. and what Lord Eldon says in Huguenin and Baseley, 14 Ves. 290.

[m] Griffin v. Deveuille, mentioned in Mr. Cox's note to 3 P. Wms. 130. n. 1.

pleased to add, that from these Ingredients there might be made and evidenced a collection of fact, that there was fraud and misrepresentation used;" and accordingly, in this very case, *Lord Thurlow* decided that the circumstances of the case, and the situation of the Parties, collectively, shewed, that the Plaintiff was deceived, abused, and circumvented, and he declared the Deed which had been obtained to be void. He further observed, (according to Mr. *Woodeson's* note,) that the case of *Osmond* and *Fitzroy* could not be supported, but on the *mixed* ground of *Lord Southampton's* extreme weakness of understanding, as well as the situation of *Osmond*[n]. Of the two accounts of what Lord *Thurlow* said, Mr. *Cox's* appears to differ much from Mr. *Woodeson:* from Mr. *Cox's* it might be inferred that weakness of mind, short of being *non compos mentis,* may be a ground for setting aside a deed; but from the other it may fairly be inferred that weakness of mind alone, would not be sufficient to set aside a deed, and that doctrine appears to be the most conformable with authorities.

Excessive old age, with weakness of mind, may be a ground for setting aside a conveyance obtained under such circumstances; but where a Lease was obtained from a woman who was upwards of seventy-five years of age, for much less than the value of the Lease, still it was held unimpeachable, and that *old age,* without some proof of fraud, would not invalidate a transaction[o].

[n] 3 Vol. Woodeson's Lect. Append. p. 18.

[o] 1 Ves. Jun. 19. Lewis v. Pead.

Underhand agreements are also relieved against in Equity. If a Debtor compromise with his Creditors, and a deed of composition is signed, or acted upon as if signed by the Creditors, and one of the Creditors, *unknown to the rest* (if known to the Creditors it would be different[p],) obtains from his Debtor a collateral security for his composition, this security is fraudulent and invalid[q]. And such security is now considered as bad at *Law*, as well as in *Equity*[r]. It has even been held that where a Creditor, apparently accepts, and gives a receipt for, a composition, in order to enable the Debtor to deceive his other Creditors, but takes a security for the rest of his demand, such security is void, although there is no joint agreement among the Creditors, nor any one is in fact deceived by the Fraud[s]. But such agreement is bad, only, it seems, as to the *Creditors*, and cannot be relieved against at the instance merely of the Debtor, who has himself been guilty[t].

Under the head of *Underhand Agreements* may be ranked *Marriage Brokage* Bonds.

The *Civil Law* allowed the *proxenetæ*, or match-makers, to receive a reward for[u] their pains; and Lord *Somers* decreed in favor of a Bond for procuring a Marriage, the procuring of a Marriage being a good consideration at Law for an *Assump-*

[p] See Hibblethwaite's case, mentioned, 13 Ves. 586, 7. Mawson v. Stock, 6 Ves. 300.

[q] Child v. Danbridge, 2 Vern. 71. Middleton v. Lord Onslow, 1 P. Wms. 768. Spurret v. Spiller, 1 Atk. 105. Chesterfield and Jansen, 2 Ves. 156. Sadler and Jackson, Ex-parte, 15 Ves. p. 52. and see 3 Ves. 456. Eastabrooke v. Scott.

[r] See Jackman v. Mitchell, 13 Ves. 586. and Leicester v. Rose, 4 East. 372. over-ruling Feize v. Randall, 6 T. R. 146.

[s] Fawcett and another v. Gee, 3 Anstr. 910.

[t] Small v. Beachley, 2 Vern. 602; but see Cecil and Plaistow, 1 Anstr. 202. and Fawcett and Gee, 3 Anstr. 910.

[u] 1 Bro. Civil Law, 79.

sit, but his decree was reversed in the *House of Lords*[v]: and it is now clearly settled, that Equity will relieve against Bonds given for the procuring of a Marriage[w]; and not only decree such Bonds to be delivered up, but also a sum paid to be refunded[x]; they being introductive of infinite mischief[y]: and as relief in these cases is given on grounds of public convenience, such Bonds do not admit of *confirmation*, though, perhaps, (a sort of confirmation) the remedy of the Party may be *released*[z]. The Court on these occasions does not interpose in respect of the particular damage to the Party; but from a public consideration, Marriage greatly concerning the Public[a]. Such Bonds tend to introduce improvident Marriages, and every contract relating to Marriage ought to be free and open[b]: and on this ground it is that though the match be a proper one, yet the Court sets the Bond aside. If it were not for the ingredient of public policy, the Court would not set such Bonds aside at the instance of the obligor, who is *particeps criminis*; and where the obligor has sought relief, costs have not been given[c].

Another sort of Underhand Agreement is, where

[v] Potter v. Keen or Hall, Cas. Parl. 76. noticed 3 P. Wms. 76. and 392.

[w] Drury v. Hook, 1 Vern. 412. Arundel v. Trevilieu, 1 Ch. Rep. 47. Hall v. Porter, 3 Lev. 411. Sho. P. C. 76. Glanville v. Fenning, 3 Ch. Rep. 18. Toth. 27. Cole and Gibson, 1 Ves. 507. Smith v. Eykwell, 3 Atk. 566.

[x] Smith v. Bruning, 2 Vern. 392.

[y] 3 P. Wms. 394.

[z] Shirly v. Martin, mentioned in note 1, to Roberts and Roberts, 3 P. Wms. 74.

[a] Law and Law, For. 142. S. C. MS. Debenham v. Ox, 1 Ves. 277. Cole v. Gibson, 1 Ves. 506.

[b] Roberts v. Roberts, 3 P. Wms. 76. Debenham v. Ox, 1 Ves. 277.

[c] 1 Ves. 277.

a Man sells his Interest to procure another an office of trust or service under the Crown; it is a contract of turpitude and cognizable by the Jurisdiction of Equity[d]: as where money was advanced for procuring a commission in the Marines, and the Purchaser was discovered to have worn a livery, he was discarded, and it was held that he was entitled to a decree for the Money paid, and to be refunded with Interest. "If," says the Lord Keeper *Henley*, "there is no Precedent of such a determination, I have no scruples to make one, and shall glory in it[e]."

Fraudulent alienations by Executors will be relieved against. Executors are, in Equity, mere Trustees for the performance of the Will, but in many respects, and for many purposes, third persons are entitled to consider them as complete owners[f]. The absolute power they possess over the Property of their Testator, is very large, both at Law and in Equity, and it is considered necessary, the better to enable them to execute their Trust, and prevent the general inconvenience of entangling third persons in inquiries, as to the application the Executors may propose to make of the Money produced by the conversion of the Assets[g]; nor is it of any consequence, with refe-

[d] Whittingham v. Burgoyne, 3 Anstr. 900.

[e] Morris v. M'Cullock, Ambl. 432; and see Law v. Law, For. 140. Hanington and Du Chatel, 1 Bro. C. C. 124. and see the late Act, 49 Geo. 3. c. 126.

[f] 7 Ves. 166. Hill and Simpson; and see Taylor v. Hawkins, 8 Ves. 209.

[g] See Humble and Bill, 2 Vern. 440. the doctrine of which case appears to have been followed, though the decree was reversed in the House of Lords, 1 Bro. P. C. 71. Nugent v. Gifford, 1 Atk. 463, 4. S. C. 2 Ves. 269. Elliot v. Merriman, 2 Atk. 42. Mead and Lord Orrery, 3 Atk. 237.

rence to the power of Executors, whether the personal Estate is bequeathed on a Trust or not. But if a person dealing with an Executor, is aware that the Executor is *misapplying* the Testator's Property, a Court of Equity will in some cases, (it must be a very strong case [h],) interfere on behalf of Persons beneficially entitled under the Testator's Will [i]. If, for instance, one concerts with an Executor, by obtaining the Testator's effects at a nominal price, or at a fraudulent under-value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the Executor [k], or in any other manner contrary to the duty of the office of Executor, such concert will involve such fraudulent Purchaser, and render him liable for the full value [l].

And it has been said, that even if there has been only *gross negligence* in the Purchaser, though not direct Fraud, Legatees may set aside the Purchase [m]. If an Executor should release a debt of £100, for one shilling, that would not bind a Creditor; but in case there is no other Creditor except the Executor himself, it would

Peacock v. Monk, 1 Ves. 131. Brickley v. Donnington, 2 Eq. Abr. 253. Franklin v. Ferne, Barn. 32.

[h] Crane v. Drake, 2 Vern. 216. Ewer v. Corbet, 2 P. Wms. 148. Jacomb v. Harwood, 2 Ves. 268. Dickenson v. Lockyer, 4 Ves. 42, 3.

[i] See Franklyn v. Ferne, Barn. 30, 33. Newland v. Champion, 1 Ves. 105. Elmslie against M'Aulay, 3 Bro. C. C. 626. Utterson v. Maire, 4 Bro. C. C. 270. S. C. 2 Ves. Jun. 95. Doran v. Simpson, 4 Ves. 665.

[k] As in Scott v. Tyler, 2 Dick. 725.

[l] See M'Leod and Drummond, 17 Ves. 167.

[m] Scott v. Tyler, 2 Dick. 725. Hill and Simpson, 7 Ves. 152.

bind him [n]. If an Administrator grants a Lease to a Person who has notice that a sale of the Premises was required by the Parties beneficially interested, it will be set aside [o].

Residuary or *general Legatees*, and, as it seems, Co-Executors [p], are never permitted, in any case, to question the disposition which the Executors have made of the Assets; but *Creditors*, *specific* and *pecuniary* Legatees, may follow either legal or *Equitable* Assets, into the hands of third persons to whom fraud is imputable. Why a *Residuary* Legatee should not, in such cases of Fraud, be allowed to follow the Assets, is not very obvious [q].

Though a transaction with an Executor or Administrator be suspicious, yet if there has been *long possession* by the Purchaser, or the Person under whom he takes, the Court will not relieve [r].

Fraudulent Agreements on a Marriage, are relieved against, in Equity: as where one affects to put the Party contracting for Marriage in one situation by the Articles, and puts that Party in another, and a worse situation, by a *private* Agreement. If a Fortune paid, is in part privately received back; or a Bond of Indemnity is given [s]; Underhand Agreements of this description are always set aside [b]; for that which is the open and

[n] See dict. Noel v. Robinson, 1 Vern. 455.

[o] Drohan v. Drohan, 1 Ball and Beatty, 185.

[p] M'Leod and Drummond, 14 Ves. 353, and S. C. 17 Ves. 172.

[q] See what Lord Eldon says in M'Leod and Drummond, 17 Ves. 169, 170.

[r] Andrew against Wrigley, 4 Bro. C. C. 125.

[s] Palmer v. Neve, 11 Ves. 167; and see Chesterfield and Jansen, 2 Ves. 156.

[b] See Redman v. Redman, 1 Vern. 248. quot. 2 vol. Blac. Com. 309.

public treaty and agreement upon Marriage must not be lessened, or any ways infringed by any private Treaty or Agreement [c].

Where, therefore, a Son, on his Marriage, was to have £3000 Portion with his Wife, and privately, without notice to his Parents (Father or Mother,) that treated for the Marriage, gave a Bond to the Wife's Father to pay back £1000 of the Portion seven years afterwards; this Bond was held void in a Court of Equity; and not made effectual, by being assigned to Creditors [d].

So, where a Father on the marriage of his Son, gave a Bond for £150 per Annum, the private agreement of Husband and Wife being that he should only be called upon for £100 per Annum, the Bond being given to deceive the uncle of the Lady, it was held that the Father could not file a Bill to have this Bond delivered up, though the Uncle made no Settlement on his Niece [e].

So, if a Father takes a Bond from a Daughter entitled to a Fortune, unknown to her Husband, it is considered to be *in the nature* of a marriage Brocage Bond, and will be ordered to be delivered up [f].

Upon the same Principle, not only Bonds, but *a Lease* granted by a Tenant in Tail, in consideration of procuring a match, has been set aside at the Suit of a Remainder-man [g].

A Bond by a young Woman secretly given to

[c] Lamlee v. Hannam, 2 Vern. 499.

[d] Turton v. Benson, 1 P. Wms. 496.

[e] Pitcairn v. Ogbourne, 2 Ves. 375.

[f] Anon. 2 Eq. Abr. 187.

[g] Stribblehill v. Brett, 2 Vern. 446.

a Man conditioned to pay him a sum of Money, if she did not marry him within a certain period after the death of her Father, he giving a Bond to the same effect on his part to marry her, has been set aside, and principally on the ground that it was *a Fraud on the Parent*, who was ignorant of the Bond and disapproved of the marriage. The fraud consists in this; that the Father thinks his child has submitted to his opinion of the match, and in that opinion, makes a provision for her to advance her in marriage, which had he known of the Bond he would not have done, or might have done in such a manner as would have prevented the marriage: it is therefore *in fraud* of the Father's right of disposing of his Fortune among his children according to their deserts [h].

In these cases where part of the marriage Portion is agreed to be returned, there is no Fraud between the contracting Parties, but on the Parents or Friends of one of them, who are deceived by settling Lands, equal to the Portion that appears to be given, and for that reason such Bonds are set aside [i].

Where, however, *A.* treated for the Marriage of his Son, and in his settlement on the Son, there was a power reserved to the Father to jointure any Wife whom he should marry, in £200 per Annum, paying £1000 to the Son, and afterwards, the Father treating about marrying a second Wife, the Son agrees with the second Wife's Relations to release the £1000, and does

[h] Woodhouse v. Shipley, 2 Atk. 535. and see on this subject Cock v. Richards, 10 Ves. 429. S. C. MS.

[i] Ib. 539.

release it, but takes a private Bond from the Father for the payment of this £1000, the Chancellor would not set aside the Bond, because it would be injurious to the first marriage, which being prior in time, was to be preferred [k].

In Marriage Contracts, the happiness of the Parents and Children are so much at stake, that it has been held, that whoever treats fraudulently on such an occasion, shall not only not gain, but even lose by it. As where upon a treaty for a marriage [l], the Woman not having so great a portion as the Man insisted upon, prevailed upon her brother to let her have £160 to make up her portion, and gave him a Bond for the repayment of it. The marriage was had; and the Husband who knew nothing of the Bond, died without Issue. The Wife survived, and after her death, and the death of the brother, the Defendant, his Executor, put the Bond in suit against the Plaintiff, her Executor: but the Bond was set aside. A *quœry* is put by the Reporter, if the condition of the Bond had been, that in case the Woman survived her Husband she should pay it, whether she could have been relieved; but *Lord Thurlow* [m] thought this would have made no difference.

In a Case where a Widow on the Marriage of her Son, agreed to release her jointure, that he might make a Settlement, and the Son *privately*

[k] Roberts. v. Roberts, 3 P. Wms. 66.

[l] See Gale v. Lindo, 1 Vern. 475. S. C. cited by Lord Chan. in Neville and Wilkinson, 1 Bro. C. C. 546; and see what is said in Wilmot against Woodhouse, 4 Bro. C. C. 230.

[m] See Neville v. Wilkinson, 1 Bro. C. C. 546.

agreed to assign a Leasehold Estate to his mother, the Agreement of the Son was set aside as Fraudulent[n].

Awards, if fraudulently obtained, may be set aside in Equity[o]; and this, though the Award be made a Rule of *a Court of Law*, under the 9th Wm. 3. c. 15[p]; but, in one case, *Lord Hardwicke* seems to have entertained doubts[q].

When Parties of age, (for an Award does not bind an Infant[r],) have submitted to make the submission to the Award a Rule of Court, it is a contempt of Court to dispute the order, unless *partiality*, *corruption*, or *misbehaviour* in the Arbitrators can be shewn; and this depends upon the denial in the Answer of the facts charged, and if that is sufficiently done, a plea of the Award will be sufficient[s]; but still, if upon the hearing of the Cause, the Evidence should be strong enough to convince the Court that the Arbitrators have been guilty of corruption, partiality, or misbehaviour, it will effectually open the plea[t].

Insurances fraudulently obtained, may be set aside; as where a Merchant had a doubtful Account of a Ship, and insured his Ship without acquainting the Insurers what danger the Ship was in, it was held to be a Fraud, and the Policy

[n] Lambe v. Hannam, 2 Vern. 465, 499.

[o] 1 Vern. 157. Harris v. Mitchell, 2 Vern. 485. Burton v. Knight, 2 Vern. 514. Tittenson v. Peat, 3 Atk. 529. Chicot v. Lequesne, 2 Ves. 315. Champion against Winham, Ambl. 245.

[p] Lord Lonsdale v. Littledale, 2 Ves. Jun. 451.

[q] Kampshire v. Young, 2 Atk. 155.

[r] 1 Ch. Cas. 279.

[s] Mitford's Pleadings, 209.

[t] Lingood v. Croucher, 2 Atk. 396. and S. C. p. 506.

was ordered to be delivered up with Costs, but the Premium to be paid back and allowed out of the Costs[v].

So, a Policy of Insurance for insuring a Life, gained by Fraud, has been set aside with Costs, both at Law and in Equity, and the Premium received on the Policy directed to go in part of Costs[w].

Other *Frauds on Marriage* besides those already noticed, are redressed in Equity. A Woman, while unmarried, may dispose of and convey her property in any manner she pleases; and a Husband whom she afterwards marries, without any Settlement made by him, or any inquiry concerning her fortune, cannot impeach a conveyance which she has made of her property for her own separate use; provided the conveyance was not attended with such circumstances as prove the same to be fraudulent[x].

So, if a Feme Sole, with the privity of her intended Husband conveys, before Marriage, a term for years in trust for herself, it is out of her Husband's power; but if a Feme does *secretly*, on the eve of Marriage, without the knowledge of her Husband, convey a Term for years in Trust for herself, this does not exclude the Husband's right[y]. But though, if a Woman previously to Marriage conveys her Property without the privity of the

[v] De Costa v. Scandret, 2 P. Wms. 170.

[w] Whittingham v. Thornburgh, 2 Vern. 206. S. C. Prec. Ch. 20.

[x] See Bowes v. Strathmore, House of Lords, 6 Bro. P. C. 436. Toml. Edit. S. C. 2 Bro. C. C. 345.

[y] Draper's Case, 2 Freem. 29,30. Pitt v. Hunt, 1 Vern. 18. S. C. 2 Ch. Cas. 73.

intended Husband, it will be considered as a fraud [z]; yet where the Deed had been made in contemplation of a Marriage with *another* Person, and with the consent of that person, it was held to be unimpeachable [a].

And where a Widow previous to the second Marriage, and to the Treaty for the same, made a *suitable provision* for the Issue by her first Husband, this was held to be valid [b]; but a power reserved to herself to dispose of the remainder of a Term settled on herself and Child, after the decease of herself and child, was determined to be void [c].

Bonds, to be paid if the obligor should marry such a Man [d]; or being a Widow, if she should marry again [e], have been ordered to be delivered up to be cancelled as being contrary to the nature and design of Marriage, which ought to proceed from free choice, and not from any compulsion.

If a *verdict* has been obtained by *Fraud*, a Court of Equity will give relief [f].

So, if a *Judgment at Law* be obtained against conscience, a Court of Equity will decree the

[z] Cotton v. King, 2 P. Wms. 360. Poulson v. Wellington, 2 P. Wms. 535. Carleton v. Earl of Dorset, 2 Vern. 17.

[a] Strathmore v. Bowes, 2 Bro. C. C. 345. Decree affirmed in the House of Lords, 3d March 1789. S. C. 1 Ves. Jun. 28. contra. Edmonds against Donnington mentioned in Carleton v. Earl of Dorset, 2 Vern. 17.

[b] Cotton v. King, 3 P. Wms. 357,674. Hunt v. Matthews, 1 Vern. 408.

[c] Blithe's Case, 2 Freem. 91,2.

[d] Key v. Bradshaw, 2 Vern. 102.

[e] Baker v. White, 2 Vern. 215.

[f] Bateman v. Willoe, 1 Sch. and Lefr. p. 205.

Party to acknowledge satisfaction on that Judgment, though he has received nothing[g].

A *Decree* obtained by Fraud, may be set aside not by rehearing or appeal[h], but upon an original Bill in the nature of a Bill of Review[i]. It is said, indeed, that a *Decree*, or Interlocutory order, obtained by Fraud, may be set aside on *Petition*[k]. An *Order* in *Lunacy* may be set aside by Bill, if obtained by Fraud[l].

So, if *Probate* be obtained of a Will procured by Fraud, the Court will oblige the Party so obtaining Probate, to consent to a revocation of the same[m].

The Purchase of an Estate in the *West Indies* by a *Creditor*, under his own execution, and which under the circumstances appeared to be a sham sale and without competition, and contrived with a view to get the Estate at an under-value, has been set aside[a]; but unless Fraud is proved, a Judicial Sale, had under the Process and Judgment of a Court having a competent Jurisdiction cannot be set aside[b].

In a case where a decree that a Will was well proved, had been obtained by consent, which afterwards, in another Suit in the Court of Chan-

[g] Barnsley v. Powell, 1 Ves. 289. See dict. Mitchell v. Harris, 2 Ves. Jun. 135.

[h] Bradish against Gee, Ambl. 229.

[i] Mussell against Morgan, 3 Bro. C. C. 74; and see Richmond v. Tayleur, 1 P. Wms. 734. Loyd v. Mansell, 2 P. Wms. 73. Barnsley v. Powell, 1 Ves. 120.

[k] Sheldon v. Fortescue Aland, 3 P. Wms. 111.

[l] Ib.

[m] Barnsley and Powell, 1 Ves. 290.

[a] Lord Cranstown v. Johnston, 3 Ves. 170. and S. C. 5 Ves. 277. and see White v. Hall, 12 Ves. 324.

[b] White v. Hall, 12 Ves. 321.

cery was on an Issue, proved to be a forged Will, the Chancellor restrained the setting up of that decree[c].

So if Dower be fraudulently or partially assigned by the Sheriff, a Court of Equity will relieve[d].

Deeds procured from a *drunken* Man, will not, it seems, be relieved against. *Lord Coke* observes in regard to Inebriation, "Although he who is drunk, is for the time *non compos mentis*, yet his drunkenness does not extenuate his act or offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time; and that as well in cases touching his life, his lands, his goods, or any other thing that concerns him[e]." And it was the doctrine of *Sir J. Jekyll*[f], that the having been in drink, is not any reason to relieve a Man against any deed or agreement gained from him, when in those circumstances, unless the Party was drawn into drink through the management or contrivance of him who gained the Deed. So, too, the opinion of *Lord Hardwicke* on this subject appears to have been, that the Drunkenness of one of the parties was not sufficient to set aside an agreement, unless some unfair advantage was taken; and therefore in the case before him, the agreement being to settle disputes in a family,

[c] Barnsley v. Powell, 1 Ves. 287.

[d] Hoby v. Hoby, 1 Vern. 218. S. C. 2 Ch. Cas. 160. Sneyd v. Sneyd, 1 Atk. 442.

[e] 4 Co. 125.

[f] Johnson v. Medlicott, 3. P. Wms. p. 130. n. a. and see Cook v. Clayworth, 18 Ves. 12.

and reasonable, and no unfair advantage appearing to have been taken, he refused to set it aside, though the party complaining of it was drunk when he executed it[g].

Decisions, by such Lawyers, are as a Law to successive Judges, though the reasons for them may not be satisfactory. It may, however, be observed, that by the Scotch Law, Persons in a state of *absolute Drunkenness*, and consequently deprived of the exercise of reason, cannot oblige themselves; but a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling a contract[h]. The distinction thus taken, seems reasonable; for it never can be said that a Person *absolutely drunk*, to use the Scotish term, has that freedom of mind, generally esteemed necessary to a deliberate consent to a contract; the reasoning faculty is for a time deposed. At *Law* it has been held that upon *non est factum* the Defendant may give in evidence that they made him sign the bond when he was so drunk that he did not know what he did[i]. And will a Court of Equity be less indulgent to human frailty? It seems to be a Fraud to make a contract with a Man, who is so drunk as to be incapable of deliberation; and if so, the contracts of such Persons would, one might think, be relievable in Equity. Cases of glaring injustice, may easily be imagined.

Heineccius[k], *Puffendorff*[l], and *Pothier*[m], all agree

[g] Cory and Cory, 1 Ves. p. 19. but Lord Eldon has observed, "it is a very strong case." Stockley v. Stockley, 18 Ves. 30, 31.

[h] Ersk. Inst. p. 447.

[i] Cole v. Robbins, Bull. N. P. 172. S. C. referred to in MS. in 1 Selw. Abridgment, 493, n. [a].

[k] B. 1. Ch. 14. s. 392.

[l] B. 1. Ch. 4. s. 8.

[m] Traite des Obligations, P. 1. Ch. 1. s. 1. art. 4.

in considering contracts, under such circumstances, as invalid, and the admirable Author of the Treatise of Equity, thus expresses himself: "Although drunkenness is a kind of insanity for the time; yet as it is of his own procuring, it shall not turn to his avail, either to derogate from his act or to lessen his punishment; but it is a great offence in itself, and this holds as well to his life, his lands, his goods, or any thing concerning him. However, Equity, as it seems, will relieve, in this case, especially if it were caused by the Fraud or contrivance of the other party, and he is so excessively drunk that he is utterly deprived of the use of reason or understanding; for it can by no means be a serious and deliberate consent[o]."

Conveyances in *Fraud of the Law* are relieved against; for as the Court acts to protect Individuals in cases of Fraud, so it will act to prevent a fraud upon the Law itself.

A Devisee, therefore, is bound to answer a charge by the Heir that the Devise was upon a *Secret Trust*, or undertaking for a charitable purpose, contrary to the Statute of Mortmain[p].

It is not, however, considered as a Fraud on the Law to take out a commission for the purpose of defeating an Execution[q], or after a *Judgment* obtained and before execution to convey all the Party's effects by way of mortgage[r]. Even after

[o] 1 Vol. Treatise of Equity, edited by Fonbl. p. 67.

[p] 9 Geo. 2. c. 36. Strickland v. Aldridge, 9 Ves. 516. S. C. MS. Mucklestone v. Browne, 6 Ves. 52. S. C. MS. and see on this subject, Adlington and Cann, 3 Atk. 141.

[q] Exparte Edmonson, 7 Ves. 303.

[r] King v. Marissal, 3 Atk. 192.

a *Fieri facias*, the Debtor may assign a Legacy, *bona fide* for a valuable consideration and without notice, and the Assignment will be good against the Creditor [s].

A Bond given for Silks taken up in order to sell to raise Money, has been ordered to be delivered up, upon payment of the Sum really raised, this being a method under the mask of trading, of lending Money at an extraordinary rate of Interest [t]. So, a beneficial lease granted at the same time with a loan of Money by Lessee to Lessor, has been set aside, as giving to the lender a profit on the Money lent, beyond legal Interest [v].

There has long been a struggle between Courts of Equity, and persons who have made it their endeavour to find out schemes to get exorbitant Interest, and to evade the Statutes of Usury; and the Court, very wisely, hath never laid down any general rule beyond which it will not go, lest other means of avoiding the Equity of the Court should be found out: they, therefore, always determine upon the particular circumstances of each case; and wherever they have found the least tincture of fraud in any of these oppressive bargains, relief hath always been given [w].

A Bill may be filed to have a Bond delivered up, and, the principal being discharged, to have

[s] Edgell v. Haywood, 3 Atk. 357.

[t] Barker against Vansommar, 1 Bro. C. C. 149.

[v] Browne v. Odea, 1 Sch. and Lefr. 115; and see Drew v. Power, ib. p. 182. Molloy v. Irvin, 1 Scho. and Lefr. 310.

[w] Lawley v. Hooper, 3 Atk. 279.

repaid what has been paid over and above legal Interest [w]. It might be different if the Securities had been delivered up [x].

In the Case of Money lost at Gaming and paid, the Court, it seems, would not grant relief, the Plaintiff in Equity being *particeps criminis* [y].

Other instances, where the Court has interfered to prevent Acts in Fraud of the Law, may be mentioned: as where *A.* granted an Annuity of £300 a year to *qualify* his *Son* to sit for a Borough, and after his Son was chosen, he tore off the Seal; but the Agreement was established, it being an Imposition on the Public [z].

So, where a Father sought by Bill, a Re-conveyance from his Son, of an Estate given to him as a qualification to enable him to sit in Parliament, the purpose being answered, the Bill was dismissed with Costs [a]. If the Party found his mistake, and repented of it before he had carried his intention into execution, and the Party did not go into Parliament, the determination would be different [b]. So if a Father, a Citizen, makes a voluntary conveyance to a Child to enable himself to swear he is not worth the Sum of £15,000, so as to avoid being chosen Sheriff, the Child would be entitled to the Estate [c]. But, it seems, a Conveyance of an Estate to qualify as a Game Keeper can be recovered back [d]; but there were

[w] Bosanquet and Dashwood, For. 37. S. C. MS.

[x] Ib. 41.

[y] Ib.

[z] Anon. MSS.

[a] See what Lord Eldon says, in Curtis and Perry, 6 Ves. 747. and Lord Hardwicke in Birch against Blagrave, Ambl. 265, 6.

[b] Birch against Blagrave, Ambl. 266.

[c] Birch against Blagrave, Ambl. 265, 6.

[d] See Bridgman v. Green, 2 Ves. 627.

circumstances of gross fraud in the case alluded to, which may distinguish it.

Conveyances made of Estates in Trust, in order to screen them from Forfeitures for Treason or Felony[e], have been set aside as against the Crown, though good as against the Party[f].

So, if an Estate in Fee, or in Tail, be given to A. but in case he commits Treason within such a Term of Years, is limited over, this is a void clause, and will not prevent a Forfeiture[g].

There is a very strong case on the subject of Fraud on the Law, determined by the highest authority. It has been holden that Parties should be liable to an additional duty, though the Act imposing that duty had not in fact passed, the intention of the Legislature to impose it, being publicly and sufficiently known, by means of the printed votes of the House of Commons[h]. The intention of the House of Commons, might appear from a vote of that House, but not the intention of the Legislature.

It is now usual to make Revenue Laws in some degree retrospective, to avoid evasions of this nature, which if not chargeable as a fraud on the Revenue, are greatly injurious to it[i].

Frauds on Covenants are relieved against.

If, for instance, a Father *covenant* on his Daugh-

[e] Young v. Peachy, 2 Atk. 258. The case of Fletcher v. Robinson, Prec. Ch. 250. contra, was over ruled in Chaplin v. Chaplin, 3 P. Wms. 233.

[f] See Duke of Bedford v. Coke, 2 Ves. 117.

[g] Carte v. Carte, 3 Atk. 180. S. C. Ambl. 32.

[h] Vicars and Attorney General, 6 Bro. C. C. 491, Toml. Edition.

[i] Ib. note by Editor.

ter's Marriage to leave her at his death a full and equal share of his Personal Estate with his Son, and afterwards transfers his Personal Estate in the Funds into his Son's name, who verbally promised to pay the Father the Dividends for his life, this will be set aside as *a Fraud on the Covenant*[i].

Covenants of this nature, are by no means censurable. They do not confine or restrict the Father's Powers. He may alter the nature of his property from personal to real; or he may give scope to projects, or indulge in a free and unlimited expence. But he is not allowed to entertain more partial inclinations and dispositions towards one Child before another. If his partiality to one Child is greater than to another, and he determines to make a difference in favor of such Child, he must do it directly, absolutely, and by an unqualified gift, surrendering all his own Right and Interest. He must give out and out. He must not exercise his power by an Act which is to take effect, not against his own Interest, but only at a time when his own Interest will cease[k].

If *undue influence* be used to obtain a Deed, a Court of Equity will set it aside; as if a Parent abuses his authority over his Child, and obtains from it a Conveyance.

An Act done out of a fear of *displeasing* a

[i] Jones v. Martin, 6 Bro. P. C. 437. and 8 vol. p. 242. reversing decree in Exchequer, 3 Anstr. 882. See a Note of the Chancellor's Argument in this case in the House of Lords, 5 Ves. 266. n. a.

[k] Jones and Martin in House of Lords, 5 Ves. 268. in note.

Father or Mother, is not that sort of fear which vitiates a Contract; but if a Person having another under his authority employs ill treatment, or menaces, to procure a Contract, the Contract under such circumstances, would, it seems, be void; but *Lord Hardwicke* was of opinion, that if a Son Tenant in Tail and a Father Tenant fo Life, agree on something for the benefit of the *younger Children*, and afterwards the Son complains of paternal authority being exerted, *though there might be something of that sort*, yet if the Agreement be reasonable, the Court will not set it aside[l].

Transactions of this sort between Parent and Child will be looked at with jealousy, and so that the Father shall not take an improper advantage of his Authority[m]; but the complaint must always be made in time, not after the Father is dead, and the Son has entered into an Act by his Marriage, under which immediately, the moment it is celebrated, persons unborn, acquire a right[n]. As where a Son, Tenant in Tail in remainder, when just of Age joined his Father Tenant for Life in a Recovery, for the purpose of raising £3000 for the Father, and resettling the Estate, the Son taking back only an Estate for Life, with remainder to his first and other Sons, &c. it was held, that whatever Equity he might

[l] Cory v. Cory, 1 Ves. 19; and see Kinchant against Kinchant, 1 Bro. C. C. 369. see also on this subject, Pothier, Tom. 1. 17. and Domat's Civ. L. 1 Vol. 243. Brown v. Carter, 5 Ves. 576.

[m] Young v. Peachy, 2 Atk. 254.

[n] Bower v. Carter, 5 Ves. 877; and see 1 Ves. 401; Cocking v. Pratt.

have had against that Settlement was lost by his Marriage and acquiescence till after the death of his Father [o].

If a Son, in plentiful circumstances, gives his Father a Bond to pay him an Annuity for his Life, and it is done freely and without coercion, it is good [p]; but if a Father who is Tenant for Life draws in a Son who is Tenant in Tail to join in a Conveyance which will destroy his Remainder, the Court upon very slender evidence will relieve the Son [q].

If a *Warrant of Attorney* to confess a Judgment [r], or if a Compromise, be obtained from a Man in Gaol, it will not, it seems, be good, unless he has proper advice and assistance [s]; as if a Counsel be present [t].

Frauds on Powers are often the subject of Relief in Equity. Some of them have been adverted to.

A Party, for instance, will not be allowed to execute a Power for his own benefit; as where Lord *Sandwich* having a Power of appointment, and thinking one of his Children was in a consumption, appointed in favor of that child, with a view, as the Court supposed, to take the chance of getting the Money as administrator of the Child [v]. But the Court will not act against a Title under a Power, upon a *mere suspicion*, that the Power

[o] Browne v. Carter, 5 Ves. 862.

[p] Blackborn v. Edgley, 1 P. Wms. 607.

[q] Heron v. Heron, 2 Atk. 161.

[r] Roy v. Duke of Beaufort, 2 Atk. 193.

[s] Hinton v. Hinton, 2 Ves. Sen. 635.

[t] Roy v. Duke of Beaufort, 2 Atk. 193.

[v] See what is said in Mac Queen v. Farquhar, 11 Ves. 479.

had been fraudulently exercised[w]: as where there was a Purchase under the Execution of a Power of Appointment by a Father, subject to Estates for Life in him and his Wife, in favor of their Son: all three joining and receiving the Money, the fair value, which is presumed to be received according to their Interests in the Estate, and the Purchaser not bound to see to the application, and the transaction appearing fair both upon the Instrument and the abstract, it was held that the Purchaser could not object to the Title on the ground of a fraudulent execution of the Power[x].

Though there be a Power in a Settlement to raise a portion for a younger Child, at *such time as the Parent should direct*, the Parent cannot direct it to be raised at fourteen; for this is against the nature of the Power. Such a Power only enables the Parent to raise it in his own Life, if it should be *necessary*. It would be proper so to do upon the Daughter's *Marriage*, or for several other purposes[y].

The Cases relative to *Illusory Appointments*, under powers, have created much difficulty in the minds of Judges, and great contrariety of opinion. At Law, if some share, *however small*, be allotted, the Appointment is effectual[z]; but in Equity, the Doctrine is very different. There, an Illusory Appointment, is considered as a *fraud*[a]; and it is there held that, if a Person has a power of appointment among

[w] Ib. 11 Ves. 467.
[x] Ib.
[y] Lord Hinchinbroke against Seymour, 1 Bro. C. C. 395.
[z] Vanderzee v. Aclom, 4 Ves. 785.
[a] Boyle v. Bishop of Peterborough, 1 Ves. Jun. 310.

Children, or other objects, in such shares, manner, and form, and at such times as he thinks fit, he must make a fair, substantial, reasonable, and not an illusory appointment; and *of this, the Court will, on a Bill filed for that purpose, form its Judgment* [b]. This doctrine, reluctantly adhered to in conformity to Precedents, seems to have overturned the Principle laid down in several other cases [c], where the Court, from the difficulty of determining what is an illusory appointment, has surrendered all discretionary authority on the subject, and has said, in determining what is illusory, that it will go as far as it is bound by Authority, but no farther; or in other words, that where the Sum appointed in any case, is not so small in proportion to the whole Sum to be appointed, as in former cases where the Proportion given has been held to be illusory, the appointment is valid.

It is very clear that wherever a Power is given, to appoint to and among several Persons, the Power is not well executed, unless *some* part is allotted to each [d]; but if the Power be in these words, "*to be disposed of amongst her Children as she shall think proper*," she may give it to one Child [e].

[b] Bax v. Whitbread, 16 Ves. 22; and see particularly Vanderzee v. Aclom, 4 Ves. 784, 5. Butcher v. Butcher, on appeal, 18 Ves. 79. etc. Colman v. Seymour, 1 Ves. 211.

[c] Butcher v. Butcher, 9 Ves. 383. Moccata v. Lousada, 12 Ves. 123. and Dyke v. Sylvester, ib. 126.

[d] Menzie against Walker, For. 72. Vanderzee v. Aclom, 4 Ves. 784.

[e] Kemp v. Kemp, 5 Ves. 856.

If an appointment be determined to be illusory, and therefore proper to be rectified, the Court, it has been holden, cannot do otherwise than by decreeing an *equal distribution*[f]; and giving the property as in default of execution of the Power[g].

Where, upon the face of the Appointment, a sufficient reason has appeared, why a nominal Sum is given, it has been held to be effective[h]; and *Lord Alvanley* was of opinion, that as between Parent and Child, a sufficient reason for giving such a sum might *be proved*[i].

If a Power of Appointment be *in part* defectively executed, the whole of the Fund will not be distributable, as in default of appointment; but so much of the Fund which is well appointed will stand, and the remainder divided as in default of appointment[k].

It has been long settled that an appointment cannot be made to *a deceased Child*[l].

And it appears to be universally admitted that if under a Power of Appointment among Children, a substantial share is given to each Child, it may be by different Instruments, at different times[m]. A power, for instance, of appointing a

[f] Gibson and Kinven, 1 Vern. 67. last edition, and see Spencer v. Spencer, 5 Ves. 362.

[g] Pocklington and Bayne, 1 Bro. C. C. 450.

[h] Bristowe and Ward, 2 Ves. 336. Long and Long, 5 Ves. 448; and see Kemp v. Kemp, 5 Ves. 859. Boyle v. Bishop of Peterborough, 1 Ves. Jun. 310. Spencer and Spencer, 5 Ves. 368.

[i] Ib. 5 Ves. 368.

[k] Bristow v. Warde, 2 Ves. 350. Wilson v. Pigott, ib. 357. Routledge v. Dorril, ib. 360.

[l] Maddison v. Andrew, 1 Ves. 57. Butcher v. Butcher, 18 Ves. 91.

[m] See Wilson v. Piggott, 2 Ves. 354.

Fee may be executed at several times—at one time to pass an Estate for Life, and the Fee at another [n].

In some of the Cases, it has been determined that where there is a power to divide among Daughters in such proportions as the Wife should think fit, *it must be equally: unless a good reason* appeared [o]; but that is not now the Rule of the Court. But, under words of that sort, if *some very good reason does not appear*, for giving a very small Sum to one, such a disposition will not be allowed [p].

But if the Person having the execution of the Power has provided for the Person in some other way, that is sufficient, and the appointment will not be considered as illusory [q].

If the words of the power be, "then to be disposed of *amongst* her children, as she shall think proper;" a series of Judges, from Lord *Nottingham* to the present time [r], have held that they amount to a gift to all the objects; and the exclusion of one is an undue execution [s]. If the words of the Power are, "to *such* of her Children as she shall think proper," that would give

[n] Borcy v. Smith, 1 Vern. 85.

[o] Astry v. Astry, Prec. Ch. 256.

[p] Kemp v. Kemp, 5 Ves. 859; and see Gibson v. Kinven, 1 Vern. 67. and Maddison v. Andrew, 1 Ves. 59. See Burrell v. Burrell, Ambl. 660.

[q] Kemp v. Kemp, 5 Ves. 861. Bristow v. Warde, 2 Ves. Jun. 336.

[r] See Gibson v. Kinven, 1 Vern. 66. Menzey v. Walker, For. 72. Maddison v. Andrew, 1 Ves. 57. Alexander v. Alexander, 2 Ves. 640.

[s] Kemp v. Kemp, 5 Ves. 856, 7.

a latitude to appoint to one only [t]. So, where the words are, "to *one* or more of his Children," or, "to *any* of his Children [v]," or, "to and amongst all *such Child or Children* [w]," or, "amongst *all or such* of his Children [x]," or, "to *such* of my Children [y]," they have been held to shew a manifest intention to give a Power to appoint to any one Child, that should answer the description [z].

A Power of appointing among *Children*, will include Children by any Marriage [a].

A Power to make a *Jointure*, if fraudulently exercised, will be relieved against. As where a Jointure is to be made, in proportion to the Portion to be received, the Transaction must be fair, *bona fide*, without fraud and collusion, and therefore if it is a nominal, not a real portion, that will not do. It often happens a Man marries a Lady with a small Portion, and he or his Friends advance Money to make up that a nominal portion, and take it back; but that is a fraud. So if the Wife has the requisite Portion, and it is settled to her separate use, that is not allowable; but wherever the Portion of the Wife is stipulated to be applied in a proper and reasonable manner, in the usual

[t] Thomas v. Thomas, 2 Vern. 513.

[v] Tomlinson v. Dighton, 1 P. Wms. 149.

[w] Wollen v. Tanner, 5 Ves. 218.

[x] Macey v. Shurmer, 1 Atk. 389.

[y] Leife v. Saltingstone, in C. P. 1 Mod. 189, 2 Lev. 104, Carter 232.

[z] Kemp v. Kemp, 5 Ves. 857.

[a] Butcher v. Butcher, 18 Ves. 91.

way of settling for the benefit of the family, that will be considered as a portion received [b].

A Jointure of a "*clear yearly Sum*," means clear at the time of making the Jointure, and not that it is to be so during its continuance [c]. The term, *clear*, is adjudged to mean, clear of Incumbrances, and all other charges which by the course and usage of the Country, in which the Lands lie, ought be borne by the Tenant; but subject to the Land-Tax and all other outgoings, which according to such course of the Country ought to be borne by the Landlord [d].

The Books abound with a variety of Cases, which have been considered as a *fraud* on the *Custom of London;* but the Statute of 11 Geo. I. c. 18. s. 17. having enabled Freemen of London, "to give, devise, will and dispose" of their Personal Estates, "as they shall think fit," most of those cases are now of no importance.

Fraud occasioned by *Preventing the execution of Deeds*, will be relieved against in Equity. As where a Recovery was prevented by a Person, with a view that the Estate should devolve upon another, with whom he was connected, Lord *Thurlow* considered it as against conscience, that any one should hold a benefit, which he derived through the fraud of another [e].

[b] See Earl of Tyrconel v. Duke of Ancaster, 2 Ves. 501, 2.

[c] Ib. 502.

[d] Ib. 504, 5.

[e] Huguenin v. Baseley, 14 Ves. 290. see also 289; and see Mestaer v. Gillespie, 11 Ves. 638. Prec. Ch. 393.

It has been doubted whether on the Sale of a Ship, the want of an Indorsement upon the Certificate, as required by the Register Acts[f], though occasioned by Fraud, can be remedied in Equity; so imperative are the words of the Acts[g].

Where an Heir apparent[h], or Devisee, prevents a Testator from charging a Legacy, by telling him it was unnecessary to give himself that trouble, and that it should be paid; such undertaking has been enforced in Equity[i]; but if the promise had been made, by a person not interested, or not solely interested, it would be different[k].

With regard to *Fraudulent Devises*, it is observable, that before the Statute *3 W. and M. c.* 14. bond and other specialty Creditors, whose debts did not immediately affect the Lands of their Debtors, were liable to be defrauded either by their Debtor devising his Lands, or by the alienation of the Heir before any action could be brought against him; to obviate these frauds, the Statute declares all Wills and Testaments, limitations, dispositions, and appointments of real

[f] 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68.

[g] See Mestaer v. Gillespie, 11 Ves. 621. S. C. MS. and see Speldt v. Lechmere, 13 Ves. 588.

[h] See Chamberlaine v. Chamberlaine, 2 Freem. 34.

Mestaer v. Gillespie, 11 Ves. 638; see also Strickland v. Aldridge, 9 Ves. 519; and see Ruck v. Kennegal, 1 Ves. 123. Barrough v. Greenough, 3 Ves. 152. Ruck v. Kennegal, Ambl. 67; see Sellack and Harris, Vin. Abr. tit. Contract and Agreement, (H.) Cas. 31.

[k] See Whitton v. Russell, 1 Atk. 449.

Estates, by Tenants in fee simple, or having power to dispose by Will, fraudulent and void, as against Creditors by bond or other specialties; and that such Creditors may maintain their Actions jointly against the Heir and Devisee; and that if the Heir alien before Action brought, he shall be liable to the value of the Land, and that the Devisee shall be chargeable in the same manner as the Heir would have been if the Lands had descended. By these Provisions the Bond Creditor is in some degree protected against the Fraud of his Debtor, or his Heir; but the statute having expressly excepted Devises for payment of Debts, or for raising Children's Portions in pursuance of any Agreement or Contract made before Marriage; bond and other specialty Creditors, whose demands do in their nature affect the Land, are still liable to be prejudiced by such right of their Debtor to devise his real Estate; for if he devise, subject to the payment of debts, his simple contract Creditors will be entitled to be paid *pari passu*, with such bond or other specialty Creditors[l]. And even Creditors whose demands are barred by the Statute of Limitations, have been let in[m].

If the Heir taking by Descent, or the Devisee

[l] See Fonbl. Eq. 1 Vol. 282, 3. in note, who cites Woolston croft v. Long, 1 Ch. Cas. 32. 3 Ch. Rep. 7. Hixom v. Witham, 1 Ch. Ca. 248. Anon. 2 Ch. Ca. 54. Girling v. Lee, 1 Vern. 63. Child v. Stephens, 1 Vern. 101. Sawley v. Gower, 2 Vern. 61. Wilson v. Fielding, 2 Vern. 763.

[m] See Fonbl. Eq. 1 Vol. 283. in note, who cites Gofton v. Mill, 2 Vern. 141.

[i] Ib. note by Editor.

alienate the Estate to a *bona fide* Purchaser, they themselves remain personally responsible, but the Purchasers are not liable[n].

Before the Statute, if the Testator had devised his Estates for the payment of his debts, *all* Creditors, whether by specialty or simple contract, were *pari passu* allowed to take the benefit of the devise[o]; for as the Money in those cases never reached the hands of the Executors, no Action lay, and the Creditor was obliged to apply to a Court of Equity for Satisfaction; whereupon Equity not being tied down to the Rule of Law, introduced a new method of administration; and seeing the Testator had made no distinction between the difference of Securities given for the payment of debts, the Court conceived that the Testator meant to do equal justice to all his Creditors[p]; and the Statute of *Fraudulent* Devises was supposed to be an approbation of Equitable assets, and after that Statute, when a devise was made for payment of debts, *all* the Creditors, were, as before the Statute, allowed to avail themselves of the Devise, and share the Estate, *pari passu*, as *equitable* Assets[q].

As we shall have occasion to consider the important doctrine as to Assets, somewhat at length,

[n] Matthews v. Jones, 2 Anstr. 506.

[o] Vid. Woolstoncroft v. Long, Ch. Ca. 32. Anon. 2 Ch. Ca. 54.

[p] 1 Bro. C. C. 139. in n.

[q] See the able judgment in Silk and Prime, 1 Bro. C. C. 139. in note; S. C. 1 Dick. 384.

in a future part of this Work, this Subject will not further be considered here.

It is laid down as a maxim, that, a Party *enabling another to commit a Fraud, is answerable for the consequences*[a]. As a corollary from this doctrine, it was the old notion of the Court, that a second Mortgagee, who has the Title Deeds, *without notice* of any prior incumbrance, should be preferred[b]; because, if a Mortgagee lends money without taking the Title Deeds, he enables the Mortgagor to commit a Fraud[c]; but this position has in more recent cases been overruled, and the doctrine now is, that the mere circumstance of parting with the Title Deeds, unless there is Fraud, Concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence, which amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first Mortgagee[d].

So, if a Trustee permits Title Deeds to go out of his Possession, for the purpose of Fraud, and intending to defraud one person, defrauds another, relief may be obtained against him[e].

So, where a Mortgagee was present whilst the Mortgagor was in Treaty for his Son's Marriage,

[a] Vid Bacon's Max. Max. 16.

[b] Vid. Mocatto v. Murgatroyd, 1 P. Wms. 394. Head v. Egerton, 3 P. Wms. 281.

[c] Vid. what J. Burnett says Ryall v. Rowles, 1 Ves. Sen. 360. 1 Atk. 168; and see what Justice Buller says in Goodtitle v. Morgan, 1 T. R. 762.

[d] See Peter v. Russell, 2 Vern. 726. Towle v. Rand, 2 Bro. C. C. 650. Plumb v. Fluit, 2 Anstr. 432. and particularly in Evans v. Bicknell, 6 Ves. 190; see also Barnett v. Weston, 12 Ves. 133.

[e] See Evans and Bicknell, 6 Ves. 174. and what is said in Clifford v. Brooke, 13 Ves. 132.

and fraudulently *concealed* his Mortgage, the Court decreed the Son, the Wife, and the Issue to hold the Land against the Mortgagee and his Heirs [f].

Notwithstanding the general doctrine in *Bexwell and Christie* [g], it seems now pretty well settled, that if on a Sale by Auction, a Vendor employs a person to bid for him up to a certain price, with a view to prevent a sale under that price, this is not to be considered as fraudulent; nor can a Purchaser, on such account, refuse a specific performance of his Purchase [h]. But if a person is employed not merely with a view to prevent a Sale at an under-value, but *to take advantage of the eagerness of Bidders to screw up the price,* such conduct, it seems, is considered as fraudulent [i].

Where all the Bidders at an Auction, except a Purchaser, are merely puffers, the Sale is fraudulent against such Purchaser; but where there are any real bidders who bid against each other, the bidding of the Puffers will not render the Sale invalid [k].

It is a very old doctrine, that where a Deed is *destroyed or concealed* by the Defendant, the

[f] Berrisford v. Milward, 2 Atk. 49. S. C. Barn. 49.

[g] Cowp. 395.

[h] Bramley v. Alt, 3 Ves. 620. Conolly v. Parsons, 3 Ves. 625; and see what is said in Twining and Morrice, 2 Bro. C. C. 331. Smith v. Clarke, 12 Ves. 447.

[i] Smith v. Clarke, 12 Ves. 483.

[k] Howard and Castle, 6 T. R. 642. Walker v. Nightingale, 4 Bro. P. C. 193. last edition, Christie v. Attorney Gen. 6 Bro. P. C. 520. last edit.

Plaintiff is entitled to relief[l], and as it seems, upon the reason in *Lord Hunsdon's* Case in *Hobart*[m].

If a Will, by which a *Personal Legacy* is given, be destroyed or concealed by the Executor, he may be cited in the Ecclesiastical Court; but in such Case a Court of Equity has a more effectual Jurisdiction, and a Party may obtain a Decree upon the head of *Spoliation and Suppression*, without being put to the difficulty of going to the Ecclesiastical Court[n].

Where a *Deed* or *Will* is suppressed by the Heir, the Party claiming under such Deed or Will, will on evidence of the contents of the Deed or Will[o], be decreed to hold and enjoy, and the Heir or Suppressor of the Deed or Will to convey[p]. In one case where no evidence of the contents of the Deed appears to have been adduced, an interested Person, who confessed he had burnt it, was, by an interlocutory order[q], committed until he consented to admit the Deed, as stated in the Bill[r]. In another case, where a Will was suppressed, and no exact evidence was adduced as to the contents, the Plaintiff, the Devisee, was decreed to hold and enjoy until the Defendant produced the Will and further order[s].

[l] Bates v. Heard, Tot. 66 S. C. 1 Dick. 4. Eyton v. Eyton, 2 Vern. 380. S. C. Prec. Chan. 116. and 1 Bro. P. C. 151.

[m] Whitfield v. Faussett, 1 Ves. 387.

[n] Tucker v. Phipps, 3 Atk. 360.

[o] Saltern against Melhuish, Ambl. 249.

[p] Dalston v. Coatsworth, 1 P. Wms. 731; and see King and Lord Hunsdon v. Countess Dowager of Arundel, Hob. 109. S. C. mentioned 2 P. Wms. 748. and Woodcroft v. Burton, noticed in the first mentioned Case.

[q] See 1 P. Wms. 732.

[r] Sanson v. Rumsey, 2 Vern. 561.

[s] Hampden v. Hampden, mentioned 1 P. Wms. 733. S. C. 1 Bro. P. C. 250.

In every Case, however, of this description the proof of the *existence* of the Deed appears to be fundamental to the Decree [t], and is usually mentioned in Decrees, affording relief in such cases.

Where a Devisee obtained a Decree to hold and enjoy against the Heir, who, it was supposed, had suppressed the Will, and pending the Suit, a third person got an Assignment of a Mortgage made by the Testator, and then purchased the Equity of Redemption of the Heir with notice of the Will, the Court would not admit the purchaser to dispute the justice of the Decree, nor to try at Law, whether the Will was not cancelled by the Testator [v].

The suppression of Deeds will, it seems, afford a strong ground for the intervention of a Court of Equity to prevent the operation of a *Fine*, even in the case of a legal Estate, and clearly, in the case of a Trust Estate [w].

If a Remainder-man gets the Deed by which the Remainder is created, into his Power, and will not allow the Tenant for Life to have a sight of it, the Tenant for Life, in such case, may execute conveyances, and though he does not

[t] Cowper v. Earl Cowper, 2 P. Wms. 748, 749, 750. Such proof appeared in Garteside v. Ratcliffe, 1 Ch. Ca. 292. Hunt v. Matthews, 1 Vern. 408. Wardour v. Beresford, 1 Vern. 452. not rightly reported in the particular mentioned in Cowper v. Lord Cowper, 2 P. Wms. 749; and see Eyton v. Eyton, Pr. Ch. 116.

[v] Finch v. Newnham, 2 Vern. 216.

[w] Bowles v. Stewart, 1 Sch. and Lefr. 225.

pursue the terms of the Power, yet Equity will relieve [x].

If a Bond be destroyed by the Trustee, the *Cestui que Trust* may file a Bill of Discovery, and if the destruction of the Bond is admitted, that does away the necessity of *Profert* at Law, and Liberty will be given to the Plaintiff to bring an action in the name of the Trustee, and further directions will be reserved till after the Trial [y].

If a Person gives a voluntary Bond, and afterwards procures, and destroys it, a Bill will lie for a discovery and payment of the Money [z].

If one has *notice* of an unregistered Conveyance in a *Register County*, it is considered as a *fraud* in him to obtain a registered Conveyance [a], and insist on the Statute [b]; and in such case the Court will relieve [c]. Notice to the Agent, is in these cases considered as notice to the Principal [d]. If a Deed of Appointment of Lands in Middlesex be made in pursuance of a power

[x] Gilbert's Lex Prætoria, MS.

[y] Seagrave v. Seagrave, 13 Ves. 439.

[z] Atkins v. Farr, 1 Atk. 287. S. C. more full 2 Eq. Abr. 247.

[a] Bushell v. Bushell, 1 Sch. and Lefr. 102. Worseley and De Mattos, 1 Burr. 474.

[b] 7 Anne, c. 20.

[c] Forbes v. Deniston, 2 Bro. P. C. 425. This is the leading case on the subject, and appears to have been extremely well considered. See 1 Sch. and Lefr. 99,100. Le Neve v. Le Neve, 3 Atk. 646. S. C. Ambl. 436. and 1 Ves. 67. etc. Blades v. Blades, 1 Eq. Abr. 358. S. C. 3 Atk. 654. Beatriff v. Smith, ib. p. 357. Cheval v. Nichols, 1 Str. 664. S. C. 2. Eq. Abr. 63. Hine v. Dodd, 2 Atk. 275. S. C. Barn. 258. Wrightson and Hudson, 2 Eq. Abr. 609. Sheldon v. Cox, Ambl. 624. Morecock v. Dickens, Ambl. 678. Bushell v. Bushell, 1 Sch. and Lefr. p. 100.

[d] Le Neve v. Le Neve, ut supra.

in a former Deed, it will be postponed to a Mortgage, subsequent to, but registered before it[e].

The notice may be proved by *parole* Evidence; upon which, however, Lord Alvanley observes, "I regret that the Statute has been broken in upon by parole evidence, and am glad to find *Lord Hardwicke*, in *Hine* v. *Dodd*[f], says, nothing short of actual fraud will do[g]."

With respect to the form in which Relief is given, in cases of Deeds fraudulently obtained, it appears that, where a Deed is set aside for fraud and imposition, a reconveyance has in several cases[h], been directed; but it seems unnecessary, and to have been done *ex abundanti cautelâ*[i]. If the Estate has been conveyed to a third person, as an Instrument, not privy to the Fraud, it would be different; and so, if the Deed is set aside, upon paying so much Money, there, till payment, the Estate remains in the Grantee[k].

[e] Scrafton v. Quincey, 2 Ves. 413.

[f] Ut supra.

[g] Jolland v. Stainbridge, 3 Ves. 486.

[h] See Barnesley v. Powell, 1 Ves. 284.

[i] See Bates v. Graves, 2 Ves. jun. 294; and see Hawes and Wyatt, 3 Bro. C. C. 156. and the remark on that case in Attorney Gen. and Vigors, 8 Ves. 283.

[k] Ib. 295; and see Hawes and Wyatt, 3 Bro. C. C. 156.

IV. Infants.

His Majesty as *Pater Patriæ,* is entitled to the care of Infants [a], and this care is delegated by the King to his Court of Chancery [b], and as it seems, to that Court only, for the Court of *King's Bench* has not any of that delegated authority that belongs to the Chancellor [c]; neither, it seems, has the Court of Exchequer. "That Court," says a learned Writer," may appoint a Guardian *ad litem:* it may also, when the Interest of an Infant comes before it, provide for its security; but whether it can appoint a Guardian to an Infant for general purposes, where none is appointed; or whether it can in an equal extent exercise that protective power which watches over the Interest of Infants in the Court of Chancery, is a point which I do not find any where solemnly determined [d]."

The Court of Chancery, therefore, it seems, has the exclusive care over Infants; and though by Act of Parliament, the Court of Wards had a particular power over Infants and Lunatics, yet in every other respect the Law as to Infants con-

[a] Bract. Lib. 3. c. 9. Fleta, Ch. 2. Stamford 39.

[b] Berty v. Lord Falkland, 2 Vern. 333, 342. 2 P. Wms. 119; and see 2 Atk. 315. 3 Atk. 105. Butler v. Freeman, Ambl. 301. De Manneville and De Manneville, 10 Ves. 59.

[c] 2 P. Wms. 118.

[d] Treatise of Equity, by Fonbl. 2 vol. 229. in note.

tinued as before; and when the Court of Wards and Liveries was dissolved by the 12 Ch. 2. c. 24. the power of the Court over Infants, resulted back to them again, in its original extent[e].

The strongest instance, perhaps, in which the Court of Chancery has exercised its Jurisdiction in regard to Infants, is where it has taken away from a Parent the custody of its Child; but this has been done in many instances: for though, in general, a Father has a natural and legal right to such Custody[f], yet a Child has been removed from the controul of a Father, *in constant habits of drunkenness and blasphemy*[g]. And so in a case of *gross ill treatment*[h], and even where (a strong case) he had become *insolvent*[i]. Acting under the same power of controul, a *Father* has been prevented taking his Child *abroad* with him, in a case, where the intention was to educate him abroad[k]; and even if it be suspected that the Child will be taken abroad, the Court will interfere[l], and oblige the Parent to give security that he will not remove the Child, or do any act to-

[e] Hill v. Turner, 1 Atk. 516; and see Roach and Garvan, 2 Ves. 159.

[f] Ex parte Hopkins, 3 P. Wms. 154.

[g] Vid. Case mentioned in De Manneville v. De Manneville, 10 Ves. 61, 2.

[h] Whitfield v. Hales, 12 Ves. 492.

[i] Wilcox v. Drake, 2 Dick. 631.

[k] Cruse v. Orby Hunter, mentioned in De Manneville and De Manneville, 10 Ves. 55 and 63. and in Ex parte Warner, 4 Bro. 101. and in 1 P. Wms. 704. note 1.

[l] Eyre v. Countess of Shrewsbury, 2 P. Wms. 102.

wards, or for the purpose of removing it out of the Jurisdiction [m].

If a Child, a Ward of Court, would not be safe, the Chancellor would not permit it even to go to *Scotland* [n]; nor would it, at the instance of a Guardian, make an order to take the Infant out of its Jurisdiction [o].

As it is beside the plan of this Work, to enter into the Common Law doctrine as to Infants, (of which there is an abundance to be found in the Common Law Writers,) what is here said, will be confined to the peculiar doctrine of the Court of Chancery on that subject; and this, (exclusive of the Privilege of Infants as allowed in the practice of the Court) principally respects, 1. the *Guardianship;* 2. the *Maintenance;* and 3. the *Marriages*, of Infants.

1. By the Common Law, a Testator could not by any Testamentary Disposition affect either his Land or the Guardianship of his Children; nor does the Guardianship of Children appear to have been made the subject of Testamentary disposition, till the 12 Ch. 2. c. 14. [p], a Statute drawn by Lord Ch. J. Hale [q], which enables the Father (not the Mother [r],) to dispose of the Guardianship of the

[m] De Manneville v. De Manneville, 10 Ves. 52.

[n] Ib. 56.

[o] Mounstuart v. Mounstuart, 6 Ves. 363.

[p] Ex parte the Earl of Ilchester, 7 Ves. 370.

[q] Eyre v. Countess of Shaftesbury, 2 P. Wms. 125.

[r] Ex parte Edwards, 3 Atk. 519.

Child until twenty-one, but not beyond that period[s]: and though a *Male* Infant marries, the Guardianship does not determine till twenty-one[t]; but by the marriage of a *Female* Infant before twenty-one the Guardianship is determined[v].

It has been recently decided, upon the Statute, that a Father may by Will dispose of the Guardianship of children born and *to be* born, including children by a second Wife[w]. It has been holden also, that a Testamentary appointment of a Guardian is not revoked by a subsequent testamentary appointment, not executed according to the Statute, and not directly importing a Revocation[x]; and that a Guardian has an Authority coupled with an Interest, and if three Persons be appointed Guardians and one dies, the Guardianship survives[y].

Strictly speaking, a Father cannot appoint Testamentary Guardians to a *natural child*; but where he names Persons in his Will as Guardians, the Court, *on Petition*, will appoint those Persons Guardians, without a reference to the Master[z]. And where a married Woman was appointed Guardian, the Money of the Infant was ordered to be paid to her upon her separate receipts[a].

[s] Ex parte Ludlow, 2 P. Wms. 638.

[t] Mendes v. Mendes, 3 Atk. 625. S. C. 1 Ves. 90. Roach v. Garvan, 1 Ves. 160.

[v] Ib.

[w] 7 Ves. p. 348.

[x] Ex parte Earl of Ilchester, 7 Ves. 348.

[y] Eyre v. Countess of Shaftsbury, 2 P. Wms. 103.

[z] Ward against St. Paul, 2 Bro. C. C. 583.

[a] Wallis v. Campbell, 13 Ves. 517.

A Testamentary Guardian, by Statute, has all the remedies at Law which a Father has [b]; but they have no more power than Guardians in Socage, and are but *Trustees*, on whose misbehaviour, or giving occasion of suspicion, the Court of Chancery will interfere [c]. And it has been holden, that a Testamentary Guardianship is not *assignable* [d], and that it will go to Executors or Administrators [e].

A Guardian appointed for a Child by a stranger, during the Life of the Parent, is ineffectual [f]. "It cannot be conceived," says Lord King, "because another thinks fit to give a Legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right, which naturally belongs to me, of being their Guardian [g];" but the Court will take care in such case, that a Child is educated according to his expectations [h].

So, a Grand-father has no power to appoint Guardians of his Grand-son, it being a right vested in the Father; but any one can give his Estate on what conditions he pleases; and there are instances where a Grand-father has given his Estate to a Grand-child, and appointed Guardians of his Estate and Person; and if the Father did not

[b] Butler against Freeman, Ambl. 302.
[c] Duke of Beaufort v. Berty, 1 P. Wms 702.
[d] Mellish and Da Costa, 2 Atk. 14.
[e] 2 P. Wms. 121.
[f] Powell v. Cleaver, 2 Bro. C. C. 500. Ex parte Warner, 4 Bro. 101.
[g] Ex parte Hopkins, 3 P. Wms. 154.
[h] 2 Bro. C. C. 500. 4 Bro. 101.

submit to the Will, the Court has made the Father's opposition work a Forfeiture of his Son's Estate. If there is any Gift to the Father in the Will, and he submits to it, the Court directs and appoints a Guardian on his presumed submission [i].

If a *testamentary Guardian* refuses to act, a *Petition*, (a Bill for the purpose is unnecessary,) may be presented to appoint another Guardian [k]; but it has been said, that where Guardians have *accepted* the Guardianship, if afterwards they will not act in the Trust, the Court will compel them, nor will the Court appoint others in their stead, unless under very particular circumstances [l].

Where there is no Guardian, an Infant may, *by Petition*, without suit, obtain an Order for the appointment of a Person to act as Guardian [m], (even where the Father is living, if he be an improvident Person,) and also obtain a reference as to Maintenance [n]; but though such an Order has often been made [o], it has in some instances been prevented being fully carried into execution until a Bill has been filed: as where the Property is considerable, or it is necessary to take accounts in the Master's Office; or when Trustees in whom a discretionary power is vested are called on to

[i] Blake v. Leigh, Ambl. 306,7.

[k] O'Keefe v. Casey, 1 Sch. and Lefr. 106. Ex parte Salter, 3 Bro. C. C. 500.

[l] Spencer against Earl of Chesterfield, Ambl. 146.

[m] Ex parte Birchill, 3 Atk. 813. Ex parte Salter, 3 Bro. C. C. 500. S. C. 2 Dick. 769. where subject much discussed by the Register. Ex parte Kent, ib. p. 88. Mellish and Da Costa, 2 Atk. 14. Ex parte Whitfield, 2 Atk. 315. Lady Tenham v. Barrett, 2 Bro. P. C. 315.

[n] Ex parte Mountford, 15 Ves. 445.

[o] See the cases mentioned by Mr. Dickens, in Ex parte Salter, 2 Dick. 772.

allow a Maintenance[p]. The Costs of the Petition will be allowed to the Guardian in his *accounts*[q].

In some cases a *Receiver* has also been appointed on *Petition*[r]; but *Lord Hardwicke* thought that was going *too far*[s]. The *right* to Guardianship will never be decided on Petition, but only on a Bill[t].

Where the Infant's Property is *excessively small*, the Court, on *Petition*, appoints a Guardian, *without a reference* to the Master; but where the Property amounted to £1500, the Court would not appoint without a reference[v].

If the Ecclesiastical Courts take upon them to appoint Guardians, *ex officio*, without a Suit instituted for that purpose, a *Quo Warranto*, it seems, might issue against them, for it is breaking in upon the Jurisdiction of the Chancery, in regard to the Guardianship of Infants[w].

If any misbehaviour be shewn in a Guardian, the Court, as it is a matter of Trust, has a superintendency over it[x]; and will interfere on *Petition* only[y], and the proper application to change a Guardian, is *by Petition*[z]; but it is said,

[p] Corbet v. Tottenham, 1 Ball and Beatty, Irish Rep. p. 60.

[q] Ex parte Salter, 3 Bro. C. C. 500.

[r] Ex parte Odell, mentioned 2 Atk. 315. Ex parte Peploe, mentioned 3 Bro. C. C. 501.

[s] Ex parte Whitfield, 2 Atk. 315.

[t] Ex parte Hopkins, 3 P. Wms. 152.

[v] Wheeler, Ex parte, 16 Ves. 266.

[w] Buck v. Draper, 3 Atk. 631.

[x] Eyre v. Countess of Shaftsbury, 2 P. Wms. 106.

[y] Ib. 117.

[z] Vid. Earl of Ilchester 7 Ves. 348.

that if a Testamentary Guardian has once taken the Trust upon him and acted as Guardian, if it is sought to remove him for misconduct, a Bill must be filed [a].

If a Testamentary Guardian be declared a Bankrupt, it will be referred to the Master to approve of another person to act as Guardian [b]. But it is no objection to a Guardian, that he is a Dissenter [c].

A Guardian cannot, unless authorized by the Will so to do [d], change the nature of the Infant's Estate, real into personalty, or personalty into real [e], unless by some act manifestly for the Infant's advantage. They cannot do it *wantonly* [f]. Lands purchased by the Guardian with the Infant's personal Estate, or the Rents and Profits of his Real Estate, will, in case of his death during his Minority, be considered still as personalty [g]: and there seems good reason for this; for if an Infant's Trustees could turn and convert his personal Estate into Real Property, they would thereby debar the Infant of the right the Law gives him of disposing of his personal Estate at seventeen, and might at their pleasure advance the Heir, and

[a] O'Keefe v. Casey, 1 Sch. and Lefr. 106.

[b] Smith v. Bate, 2 Dick. 631.

[c] Corbet v. Tottenham, 1 Ball and Beatty, Irish Rep. p. 61.

[d] Terry v. Terry, Prec. Ch. 273.

[e] See Dict. in Rook and Warth, 1 Ves. 461.

[f] Inwood v. Twyne, Ambl. 419, 420.

[g] Gibson and Scudamore, 1 Dick. 45. S. C. Select cases in Ch. p. 63. and Mos. 6. Earl of Winchelsea v. Norcliffe, 1 Vern. 434.

prevent an Infant from providing for his younger children [h].

Where the Guardian of an Infant *Tenant in Tail*, cuts down Timber, the Money it produces will be considered as the *personal* Estate of the Infant; but if the Infant has the *Fee*, it will be considered as *Real* Estate [i].

Money ordered to be laid out in Land, must be so laid out; nor can there be an election to have the Money, as there might if the Infant was of age to elect [k].

In some cases the Personal Property of an Infant has been ordered by the Court to be laid out in the purchase of Land, though there was no authority in the Will for changing the nature of the Property; but at the same time, it has been ordered that the Estate purchased should be conveyed in Trust, for the Infant *his Executors and Administrators*, until he should attain the age of twenty-one, and afterwards, for him and his Heirs [l].

If a feme purchases a Church Lease to her and her Heirs for three Lives and dies, leaving an Infant Daughter, and two of the lives die, and the Infant's Guardian renews the Lease, this is

[h] 1 Vern. 437; and see Pierson v. Shore, 1 Atk. 483.

[i] Tullit v. Tullit, Ambl. 370. Mason v. Mason, mentioned Ambl. 371.

[k] See dict. in Rook and Warth, 1 Ves. 461.

[l] Ashburton v. Ashburton, 6 Ves. 6; and see Sergeson v. Sealey, 2 Atk. 413.

a new acquisition, and goes to the Heirs on the part of the Father [m]

The Guardian is the proper Judge at what school to place his Ward; and the Court will not indulge the Infant in being put with a private Tutor, or in changing his school; and if he should refuse to go to school, will compel him [n]. In the case of a *Female* Ward, above the age of puberty and marriage, some weight will be laid on the inclination of the Infant, as to with whom she should reside, and be educated [o].

If Guardians disagree as to the management of their Ward, the Guardianship devolves on the Court [p]; and where there were differences between Guardians, as to the Education of the Ward, parole Evidence was held to be admissible of the Intent of the Father. Indeed, in such Cases, all sorts of Evidence, it has been said, are received, to govern the Court in its direction [q].

2. The doctrine of the Court relative to the *Maintenance* of Infants, may next be considered.

Sir Joseph Jekyll was the first who ordered a reference as to Maintenance, though no Bill was filed for that purpose; and this has since been frequently practised [r]; but the more recent course of the Court seems to be, not to grant a Maintenance, upon Petition only, except in very special

[m] Mason v. Day, Prec. Ch. 319; and see Pierson v. Shore, 1 Atk. 480.

[n] Hall v. Hall, 3 Atk. 721; and see Anon. 2 Ves. 374.

[o] Anon. 2 Ves. 375.

[p] Storke v. Storke, 3 P. Wms. 52.

[q] Anon. 2 Ves. 56.

[r] See Ex parte Kent, 3 Bro. C. C. 88. and Ex parte Salter, Ib. 500.

cases: as where there is a specific fund for Maintenance; or the property is very small; but, as a general Rule, if the Infant has £100 per Annum, a Bill should be filed [s]. In those cases where Maintenance is directed without suit, *Costs* may also be ordered [t].

Maintenance will not in general be allowed for *time past* [v], but it may, under particular circumstances [w]; but interest is never allowed on arrears of Maintenance, any more than upon the arrears of a Jointure [x].

Where there is a *specific Legacy* of Stock, Dividends are due for Maintenance, from the death of the Testator [y].

Where a Fund is given as a Bounty, to a child, the Father, *if of ability*, notwithstanding a Provision for maintenance in *the donation*, must maintain the Child [z], unless in cases where it is given to the Father [a].

Where Legacies are given to a Child by a *Relation*, a Father is not only obliged to maintain the Child, and provide for him out of his own Pocket,

[s] Ex parte Mountfort, 15 Ves. p. 448.

[t] Ex parte Thomas, Ambl. 146.

[v] Hughes v. Hughes, 1 Bro. C. C. 386. Hill and Chapman, 2 Bro. C. C. 231.

[w] Maberly and Turton, 14 Ves. 499. overruling Andrews and Partington, 3 Bro. 60. but see the remark on that case by the Solicitor General in Hoste v. Pratt, 3 Ves. 733; see also Sisson v. Shaw, 9 Ves. 288. Reeves v. Brymer, 6 Ves. 425. Sherwood and Smith, 6 Ves. 454.

[x] Mellish and Mellish, 14 Ves. 516, 517.

[y] Barrington v. Tristham, 6 Ves. 349.

[z] Hughes against Hughes, 1 Bro. C. C. 386. Munday against Earl How, 4 Bro. C. C. 226; but see Hoste v. Pratt, 3 Ves. 730. where, maintenance being directed by the will, no inquiry was directed as to the ability of the father.

[a] 1 Bro. C. C. 388.

but he cannot apply the Legacy to set him out in the World, or put him out an apprentice or clerk [b].

But whether an Infant shall have an allowance of Maintenance during the life of the Father, depends always upon the particular circumstances of the case [c]. The question generally is, whether he is of *ability*. A parent must maintain his Child, unless totally incapable, or by having a numerous family of children, he borders upon necessity; nor will the Court direct the Interest of a contingent Legacy to be applied for the Child's Maintenance, unless, from the Poverty of his Parent, he is in danger of perishing for want [d]. And where Maintenance is allowed, it is always paid to the Parent out of the Child's Estate; and there is no instance of its being deducted out of a Legacy left by a Father to the Child [e], or out of a *debt* due from the Father, though insisted on by Creditors [f].

A Mother, married to a second Husband, is not obliged to maintain the Children by the first [g]; but is entitled to an allowance for Maintenance, from the Interest of their fortunes [h].

Where a Man had children by his first Wife, and on her death married a second, and by the Settlement, the Children of that Marriage were expressly secured a Maintenance, it was held

[b] Darley v. Darley, 3 Atk. 399.
[c] Jackson v. Jackson, 1 Atk. 515.
[d] Butler v. Butler, 3 Atk. 60; and see Jeffreys v. Jeffreys, 3 Atk. 123.
[e] Jeffreys v. Jeffreys, 3 Atk. 123.
[f] Ib. Bank of England v. Morris, cited Ib.
[g] Sed Vid. 2 Ventr. 353.
[h] Billingsly against Critchet, 1 Bro. C. C. 268.

after the second Wife's death, that the Father was not bound to maintain a Child by the second Wife.

Maintenance will, if necessary, be allowed to Infants, where the chance of surviving is equal among all, and no other interest that upon any contingency would take effect, will be defeated [i], or where the Devisee over consents [k]; and this, though there be in the Will, under which the Infants claim the maintenance, a direction for accumulation during Minority. But where, in the Event of the Infant's death under twenty-one, leaving Issue, the accumulated Property is to go to such Issue, Maintenance is not allowed [l]. In those cases where the Infant has not the absolute Interest, Maintenance is not granted on Petition only, but on a *Bill filed* exclusively for that purpose [m].

Where, from proceedings on a Bill for an Account, the Court is satisfied that the Fund is clear, a *Residuary* Legatee in respect of the necessary delay on taking of the accounts, may have an allowance for maintenance, in the mean time [n].

When Trustees are directed by will to apply so much Interest as may be necessary for main-

[i] See Greenwell v. Greenwell, 5 Ves. 194. Errington v. Chapman, 13 Ves. 25. Ex parte Kebble, 11 Ves. 604. Lomax v. Lomax, ib. 48.

[k] Fairman v. Green, 10 Ves. 48.

[l] Errat and Barlow, 14 Ves. 202. Aynsworth v. Pratchett, 12 Ves. 321. Ex parte Kebble, 11 Ves. 604. Collis v. Blackburne, 9 Ves. 470.

[m] Fairman v. Green, 10 Ves. 45. Sed quære; for Ex parte Kebble, 11 Ves. 604. was on petition.

[n] Warter v. ———, 13 Ves. 92.

taining, &c. the Court will, if the Infants have other Property, confine the maintenance to what is actually necessary [o].

The strongest case, perhaps, where maintenance has been allowed, was where a Testator directed maintenance for his Sons during Minority, and for his Daughter till twenty-one or Marriage; and gave her a Legacy in case she should attain twenty-one, payable, and to carry Interest from that time; yet having married at eighteen, she was allowed maintenance for the interval, until twenty-one [p].

The Interest of small Legacies (£300) has been ordered to be paid to the Mother for maintenance, upon her affidavit, that the Father was abroad, in very embarrassed circumstances [q].

The Court, it seems, always refers it generally to the Master, to consider of a proper allowance, and does not make a special reference [r]; and a large allowance, for maintenance and education, will, under circumstances, be allowed [s]; as where a Guardian or Father are in distressed circumstances [t]: and where younger children are left destitute, a large allowance will be made *to the eldest Son*, to enable him to maintain them [v].

[o] Rawlins v. Goldfrap, 5 Ves. 440.

[p] Chambers v. Goldwin, 11 Ves. 1.

[q] Walker v. Shore, 15 Ves. 122.

[r] Burnett v. Burnett, 1 Bro. C. C. 179.

[s] Ex parte Lord Petre, 7 Ves. 403.

[t] Roach v. Garvan, 1 Ves. 160.

[v] Harvey v. Harvey, 2 P. Wms. 24. Lanoy v. Duke and Duchess of Athol, 2 Atk. 447. Petre v. Petre, 3 Atk. 511.

It is a general rule that a Trustee cannot, for the purpose of maintenance, break in upon the capital, though the capital may be so small, as not to leave a comfortable maintenance and education; and it is very rarely, that the Court itself has broke in upon the capital, for the mere purpose of maintenance [w].

3. *The Marriages of Infant Wards of the Court* of Chancery may next be considered.

Where Infants under the care of the Court, are upon a Treaty of Marriage, the consent of the Court ought to be obtained. When the Court is applied to, it generally makes a referrence to the Master, to see whether the settlement proposed is proper: if it is found to be improper, the Court will not give the Infant leave to marry [x].

In like manner, in the City, an Orphan Infant cannot marry without the Licence of the Court of Aldermen, on pain of commitment. The Husband is usually required to take out his Freedom of the City, and the Court refers it to the Common Serjeant to approve of a proper Settlement [y]. And though it appears the Party had no notice of his Wife being a City Orphan, yet still he is punishable, for he is bound to enquire [z].

The Marriage of a Ward, without the consent of the Guardian, is *a ravishment of the Ward*, and

[w] Walker v. Wetherall, 6 Ves. 474.

[x] Smith v. Smith, 3 Atk. 305.

[y] See Frederick v. Frederick, 1 P. Wms. 710. etc.

[z] Vid. note D. to Herbert's Case, 3 P. Wms. 118.

severely punishable by the *Stat. of Westminster*, 2. c. 35. [a]. Nor is there any thing a Court of Equity entertains greater jealousy of, nor shews more resentment against, than the unlawful Marriage of Infants [b].

No act in Life is of more importance to an Individual than Marriage; none on which the color of his future Life so much depends.

If an Infant, a Ward of the Court, (filing a Bill makes him a Ward of Court [c],) be suspected of being about to make an improper Marriage, and there be an affidavit of such intended Marriage, the Chancellor will grant an Injunction generally to restrain all communication with the Infant, by Letter or otherwise [d]. *Hearsay* Evidence of *declarations*, will be attended to, on such occasions [e].

Where an Infant Ward of the Court is suspected of forming an improper Marriage, and the Mother, her Guardian, countenances it, the Court will appoint a Guardian in her room, and restrain her from giving her consent to the Marriage without leave of the Court, and that the Infant should not be married without leave of the Court, and the Infant will be restricted from receiving any Letters or Messages from her admirer [f].

[a] 2 Inst. 440. 2 P. Wms. 110. Fitz. Nat. Brev. 329. 2° Edit.

[b] 2 P. Wms. 111.

[c] Ambl. 303. Lord Raymond's case, For. 60. S. C. MS.

[d] Pearce and Crutchfield, 14 Ves. 206; and see Lord Raymond's Case, For. 58. S. C. MSS. Beard and Travers, 1 Ves. 313.

[e] Beard v. Travers, 1 Ves. 313.

[f] See Lord Shipbrook v. Lord Hinchinbrooke, 2 Dick. 547, 8. and the case there mentioned; and see Roach and Garvan, 1 Dick. 88.

All Persons, it seems, concerned in the contrivance of the Marriage of a Ward of Court, knowing her to be such, are punishable for the contempt [g].

If *Peeresses* are instrumental in the Marriage of a Ward of Court, without the leave of the Court, a *sequestration* will be issued against them for their contempt [h].

A *Barrister*, a principal contriver of the Marriage of a Ward with a large fortune, has been, for his offence, committed to the Fleet, prohibited from practising at the Bar, and has been struck out of the Commission as a Justice of the Peace [i].

If a Lady, a Ward of the Court, marries *after she is of age*, without the consent of the Court, this is no contempt in the Husband, nor can the Court oblige him to execute a Settlement, if the Husband does not seek its assistance to obtain her Property; but if the Lady be under age, it will be considered as a contempt, and the Court is enabled, by Imprisonment, to compel the Husband to make a proper Settlement [k]. In a very aggravated case, where a Guardian married his Ward, who was of age, to his Son, who had no Property, it was held to be punishable by an *Information* [l].

Where a Marriage of a Ward of Court, without consent, takes place, on a Petition by the Guardian, all Parties concerned will be ordered to

[g] Moore v. Moore, 2 Atk. 157.

[h] Eyre and Countess of Shaftsbury, 2 P. Wms. 112.

[i] Mr. Justice Mitchell's Case, 2 Atk. 173. S. C. mentioned Ambl. 304.

[k] Ball v. Coutts, 1 Ves. and Beames, p. 300.

[l] Goodhall v. Harris, 2 P. Wms. 560.

attend, and the Husband will be committed, but not to *close confinement*, (though *Lord Hardwicke* made some orders to that effect [m],) and restrained from receiving his Wife's visits; and she, it seems, may be compelled to leave her Husband: after some time, the Husband may petition to be discharged, on executing a Settlement, approved by the Master.

The personal attendance, of a person running off with, and marrying a Ward, has been dispensed with, on offering to go before the Master, and make a Settlement [n]: and in some cases, he has been discharged, on *undertaking* to make a Settlement [o]; but this, Lord Eldon refused to do [p]. The common course of the Court is to have a reference to the Master, to see that a proper Settlement shall be made, before the contempt can be cleared [q].

Marrying an Infant Ward of the Court is a contempt, though the Parties concerned in such Marriage had no notice that the Infant was a Ward of the Court [r]; and a Marriage in *Scotland*, though on the day the Bill was filed, has been held to be a contempt [s].

And though a Marriage has been had with a Ward of Court, and some years elapse before it comes to the knowledge of the Court, yet it will

[m] See 8 Ves. 79.

[n] Green against Pritzler, Ambl. 602.

[o] Stackhole's case, 3 Ves, 89. Winch and James, 4 Ves. 387.

[p] Bathurst v. Murray, 8 Ves. 79.

[q] Stevens v. Savage, 1 Ves. Jun. 154.

[r] Herbert's Case, 3 P. Wms. 116.

[s] Sallis v. Savignon, 6 Ves. 572.

not suffer time to affect the right of the Court to interpose in respect of the contempt[t]; but it will not punish the Party in such case, unless very strongly called upon so to do[v].

If the Father is of ability, and implicated in the procurement of the Marriage, the Court, it seems, will use its animadversion, to force a proper provision from him.

In Settlements of the Property of Female Wards of Court, much will depend upon the Fortune of the Husband, and his conduct. If a Beggar marries the Woman for the sake of her Fortune, the Court will not permit him to touch that Fortune; but if the Husband be of equal rank and fortune with the Ward, and as considerable a Settlement is made by the one as by the other, attention will be paid to such circumstances[w]. The usual Settlement, seems to be, to settle one-fifth of the Dividends and Interest of the Property upon the Husband, and the residue upon the Wife for her sole and separate use during their Joint Lives, with a clause to prevent anticipation[x], and a power to the Wife to give another one-fifth to the Husband by Will; the residue, subject to a Provision for maintenance, to accumulate, and with the principal to go to the children at their ages of twenty-one or Marriage, or if only one child, to that child; and in the event of a second Marriage[y],

[t] Ball v. Coutts, 1 Ves. and Beames, 297.

[v] Ib. 302.

[w] Ball v. Coutts, 1 Ves. and Beames, p. 303.

[x] See Chassaing v. Parsonage, 5 Ves. 17.

[y] In one case on a second Marriage, the Wife was enabled to settle the Interest of a moiety of her fortune on the second Husband. See 4 Ves. 386.

a power to the Wife to charge, by way of appointment, to each child, a share not exceeding the share of each child by the first Marriage [y]. In case of no children, the Husband surviving, the Limitation, is, in default of appointment, to her next of Kin, exclusive of the Husband [z].

In a gross case on the part of the Husband, the Court refused even to pay his debts out of the accumulations [a].

Where, upon the Marriage of a Ward of the Court, the Husband had falsely sworn she was of age, though only fourteen, the Clergyman was ordered to attend and was reprimanded, and the Husband was committed, and ordered to be indicted, which he was, and was convicted, and suffered the punishment of the Pillory and Imprisonment. On his Petition to be discharged, on executing a Settlement, the Chancellor would not approve a proposal giving him any farther Interest, than in case of his surviving his Wife, and no Children, and an appointment in his favor by his Wife [b].

Contriving a Marriage, without a due publications of Banns, is a conspiracy at Common Law, exclusive of the *contempt*, for which, it has been said, a Party *may* and *ought* to be indicted [c].

Where an Infant is committed by the Court to the custody or care of any one, such Committee gives a Recognizance, that the Infant shall not

[y] See Wells v. Price, 5 Ves. 398.

[z] Bathurst v. Murray, 8 Ves. 74.

[a] Chassaing v. Parsonage, 5 Ves. 15.

[b] Millet v. Rowse, 7 Ves. 419. and vid. what is said of that case in Ball v. Coutts, 1 Ves. and Beames, p. 298.

[c] Priestley v. Lamb, 6 Ves. 421. Schrieber v. Leteward, 2 Dick. 592. and the cases cited; and 2 P. Wms. 560.

marry without leave of the Court, which form is very rarely altered, and only under special circumstances: so that if the Infant marries, though without the privity or knowledge, or neglect of the Committee, yet the Recognizance is, in strictness, forfeited, whatever favor the Court upon application, may think fit to shew such Committee, when he appears not to have been in fault[d]. In Dr. *Davis's* Case[e], the Recognizance was on application moderated, viz. "That the Infant shall not marry, *with the Committee's Privity*, without the Consent of the Court."

It has been determined, that a general Act of Pardon, though with an exception of contempts, extends to pardon contempts in marrying Infant Wards of a Court of Equity[f].

Agreements *before Marriage* on behalf of Infants, by Parents and Guardians, or by the Infant alone[g], have been held binding on the Infants[h]; but, it seems, a female Infant cannot be irrevocably bound by an Article entered into during minority, as to *real Estate*, but may refuse to be bound, and abide by the Interest the Law casts upon her, which nothing but her own act after the period of majority, can fetter or affect[i]. It has, however, been determined, that a female Infant may by a *Join-*

[d] See Eyre v. Countess of Shaftsbury, 2 P. Wms. 102.

[e] 1 P. Wms. 698.

[f] Phipps v. Earl of Anglesea, 1 P. Wms. 696.

[g] Williams v. Chitty, 3 Ves. 545. see on this subject, Slocombe against Glubb, 2 Bro. C. C. 551.

[h] Anslie v. Medlycott, 9 Ves. 19; and see Durnford and Lane, 1 Bro. C. C. 106; but see what is said of that case in Carruthers v. Carruthers, 4 Bro. C. C. 510. Cannel v. Buckle, 2 P. Wms. 244. Lacy v. Moore, 3 Bro. P. C. 514. Price v. Seys, Barn. 117. Seamer v. Bingham, 3 Atk. 56.

[i] Clough v. Clough, 5 Ves. 717. S.C. before Lord Thurlow, mentioned, 3 Woodeson, Lect. 453. in note; and see what is said in Durnford and Lane, 1 Bro. C. C. 115.

ture be barred of her right to Dower, if the same be *competent and certain* [k],—as certain as her *Dower;* but if not certain, if only to take place upon a remote contingency, it will not bind [l].

And though, in general, a Father or Guardian, on the Marriage of an Infant Child or Ward, cannot, it seems, by Agreement bind the Interest of the Infant in its *real Estates*, unless where there is issue of the Marriage, and for that reason, Acts of Parliament have in such cases been resorted to [m], in order to make an effectual Settlement [n]: it has yet been held, that a *Feme Infant* seized in fee, on a Marriage, with consent of her Guardians, may covenant, in consideration of a competent Settlement, to convey her Inheritance to her Husband, and that a Court of Equity will execute the Agreement, though no damages could be recovered at Law [o]. But this doctrine is not fully settled. *Lord Hardwicke* thought *Cannell* v. *Buckle* went a great way, as it related to the Inheritance of the Wife; "but there are cases," he observed, "where the Court will do it: as if the Lands of the Wife were no more than an adequate consideration for the Settlement that the Husband makes, and if after the Marriage the Wife should die and leave Issue, who would be entitled to Portions provided for them by the Settlement, it would in that case be very reasonable to affirm that Settlement [p]."

[k] See Drury v. Drury, or Drury v. Earl of Bucks, by which name it is reported, in 5 Bro. P. Cases 570.

[l] See Carruthers v. Carruthers, 4 Bro. C. C. 500: and see Smith v. Smith, 5 Ves. 189. Clough v. Clough, 5 Ves. 710.

[m] As in Blois v. Lady Hereford, 2 Vern. 501.

[n] Harvey v. Ashley, 3 Atk. 613.

[o] Cannell v. Buckle, 2 P. Wms. 243. approved in 3 Atk. 615. but see 1 Bro. 106. and 5 Ves. 717.

[p] Harvey and Ashley, 3 Atk. 615.

There are cases in regard to *Money Portions* in possession or *Contingency*[p], where a Father contracting for an *Infant* Child may bind the Child, especially if the Child claim any thing under the Settlement; but then it must be *before* Marriage, and in consideration of the Marriage; for the Court will not suffer her to claim a benefit one way, and not to be bound the other[q]. Indeed, if a Parent or Guardian could not, in such cases, contract for the Infant, so as to bind the property, the Husband, as it is a personal thing, would be entitled to the absolute Property in it, immediately upon the Marriage[r].

And though in cases of this kind, Parents or Guardians act *fraudulently* or *corruptly*, the Marriage Agreement is not therefore to be set aside, or the Children to be stript, but the Father or Guardian will be decreed to make satisfaction, and the Husband if a Party to the Fraud will be made do so likewise[s].

A Settlement to bind an Infant must be fair and reasonable[t]; but inequality between the Dower and the Jointure will not always invalidate a Settlement. If, for instance, a female Infant, marries a Gentleman of great Estate, the Dower is one-third, and she has a Jointure made to her of one-tenth of the value; yet as the Law intrusts Parents and Guardians with the Judgment for the Provision of Infants, she cannot set aside the Settlement[v].

[p] Harvey v. Ashley, 3 Atk. 613. Theobald v. Defay, 2 P. Wms. 608. S. C. 1 Inst. 101.

[q] Seamer v. Bingham, 3 Atk. 55.

[r] 3 Atk. 613.

[s] Harvey and Ashley, 3 Atk. 611.

[t] Williams against Williams, 1 Bro. C. C. 152.

[v] 3 Atk. 612.

And in those cases where the Settlement is voidable by the Infant, it may be *confirmed* by the Acts of the Infant, after attaining full age, as by receiving Interest[w], or accepting a Jointure for a year and an half[x].

If a *Male Infant* marries an adult female, who by Settlement covenants that her Estate shall be settled to certain uses, he is bound by her Covenant[y].

The favor shewn to Infants may be traced in a variety of cases, and particularly in the Practice of the Court, as will be seen hereafter.

If a Legacy is given for the benefit of an Infant in one way, and it cannot be so applied, it may be applied for his benefit in another way: as where the Legacy was given to put him into orders, and he became a Lunatic, it was applied in his support[z].

It appears to have been *formerly* the Practice, to *petition* the King to direct his Judges to take a *Fine* or *Recovery* from an *Infant*. This Petition, the King referred to his Chancellor for his *Report* as to the propriety of what was thus petitioned for; and if after argument before him, he reported that the Petition was reasonable, the King granted a *Privy Seal*[a]. But *Common Recoveries*, and Fines suffered by Privy Seal, are now disused, and *private Acts of Parliament* are had recourse to instead[b].

[w] Franklin v. Thornburgh, 1 Vern. 132.

[x] Hervey v. Ashley, 3 Atk. 607. mentioned, 2 Ves. 671; and see Smith v. Low, 1 Atk. 490.

[y] Slocombe v. Glubb, 2 Bro. C. C. 548.

[z] Barton v. Cooke, 5 Ves. 463.

[a] Vid. Sir Humphry Mackworth's Case, 1 Vern. 461. and Mr. Raithby's note.

[b] Hesketh v. Lee, 2 Sannd. 96. a.

5. SPECIFIC PERFORMANCE OF AGREEMENTS.

The Jurisdiction of the Chancellor to enforce the Specific Performance of Agreements, forms one of the great heads of Jurisdiction in Courts of Equity, and in the opinion of Lord *Hardwicke*, "the most useful one[a]." By the *Common Law*, every Covenant and Agreement, where there was no proper Conveyance to transfer the Right of the thing itself, was but personal, and being only personal, the party, if it were unperformed, could only recover damages. If, therefore, a man covenanted to settle his Lands upon Marriage, or to convey them for a valuable consideration, the Covenantee could only recover damages at Law for the breach of such Covenant; but had no remedy there, for the Settlement of the Thing itself. This was thought much less than complete Justice, because the party who had entered into the Covenant, was in conscience bound not only to make compensation for the breach, where he could not perform it, but also actually to perform it, where it was in his power, and, therefore, a Court of Equity interposed [b].

The earliest trace of the Equitable Jurisdiction of the Court of Chancery, in *decreeing Agreements*, is supposed to be, in a case stated in the Year Book

[a] Penn v. Lord Baltimore, 1 Ves. 446.

[b] See on this subject Alley v. Deschamps, 13 Ves. 228. Mitford's Pleadings, p. 108. 1 vol. Sch. and Lefr. 129. Lex Prætoria, MS.

of 8 E. 4. 4 b. where it is said by *Genney*, "that if I promise to *build you* a *house*, and do not perform my promise, you have your *subpœna* [c]. And *Fineux*, *Chief Justice*, in the 21 Hen. 7. speaking upon the different remedies given in the Courts, for non-performance of contracts, observes, "that if a man bargain with another that he shall have his land for £10, and that he will make him an estate therein by such a day, and he do not make the estate, an *action upon the case* lies; but it is to be observed in that, he shall only recover damages; but by *Subpœna* the Chancellor may compel him to execute the estate, or imprison him."

At whatever time the Jurisdiction began, it is now very clear, that if a contract has been entered into by competent Parties, and is, in the nature and circumstances of it, unobjectionable, it is as much of course in a Court of Equity, to decree a specific performance, as it is to give damages at Law [d]. The Court, it is said, has a *discretion* in such cases [e], and so it has; but it is not an arbitrary and capricious, but a regulated and judicial, discretion [f]; a discretion, governed by established Rules of Equity [g].

It has been said [h], and generally speaking, correctly [i], that in cases of Agreements, before Lord

[c] Sed. quæ, if such an agreement would now be enforced, see post.

[d] Hall v. Warren, 9 Ves. 608.

[e] See 1 Ves. 279. and 1 Ves. and Bea. 527.

[f] White v. Damon, 7 Ves. 35; and see Buckle v. Mitchell, 18 Ves. 111.

[g] Goring v. Nash, 3 Atk. 188.

[h] Dodsley v. Kinnersley, Ambl. 406.

[i] Marquis of Normanby v. Duke of Devonshire, 2 Freem. 216. 1 Vern. 159.

Somers's time, the Party was sent to Law, and if he recovered any thing by way of damages, the Court of Chancery entertained the Suit; but there must have been exceptions to this Rule, for there are cases where the Party may be relieved in Equity, though no damages could be obtained at Law: as where a feme Infant seized in Fee, on a Marriage, with the consent of her Guardians, covenants in consideration of a competent Settlement, to convey her Inheritance to her Husband, Equity will execute the Agreement, though no action would lie at Law to recover damages[k]. So, if an Agreement be made for the Sale of an Estate, and the Vendor dies before the period when the Estate was to be conveyed, the Heir is bound to convey, though no action lies. So, upon an Agreement to assign a *chose in Action*, Equity will relieve, though no damages at Law would be given for the breach of the Agreement; and there are other cases of the kind which might be mentioned[l]: the proposition, therefore, of Lord *Raymond*[m], that a specific performance shall never be compelled, for the not doing of which, the Law would not give damages, seems too broadly laid down.

The *effect* of a mere contract for the Purchase of Land, is in many respects very different at Law, from what it is in Equity. At Law, the Estate remains the Estate of the Vendor, and the

[k] Cannel v. Buckle, 2 P. Wms. 244. see ante p. 282, 3.

[l] See Wiseman v. Roper, 1 Ch. Rep. 158. Cary 84. Attorney General v. Day, 1 Ves. 222. Whitmill v. Farrell, ib. 258.

[m] Dr. Bettesworth and Dean and Chapter of St. Paul's, Select. Cas. in Ch. 68.

Money that of the Vendee[n]. It is not so in Equity; there, *in general*, it is a Rule, that what is contracted to be done for a valuable consideration, is considered as done[q], and nearly all the consequences arise, as if it had been so, and as if a Conveyance had been made at the time to the Vendee[r]. The Vendor of the Estate, whether it be Freehold or Copyhold[s], is from the time of his contract, and previous to a Conveyance, considered only as a Trustee for the Purchaser, and the Vendee is, as to the Purchase Money, considered as a Trustee for the Vendor[t]. The Estate, provided a good Title can be made[v], is considered as the Real Property of the Vendee; and *vendible*, *chargeable*, *deviseable*[w], by him, even under general and sweeping words[x], will be considered as Assets[y].

So, money, articled or directed to be laid out in Land, is considered as Land, and has all the incidents of a real Estate[z]. It is no longer considered as personal Assets[a]. A Husband may be Tenant

[n] Seton v. Slade, 7 Ves. 274. and see the Reasons in Cave and Holford, 7 Bro. P. C. 602.

[q] See Frederick v. Frederick, 1 P. Wms. 713. Lechmere and Earl of Carlisle, 3 P. Wms. 215. Bash v. Dalway, 3 Atk. 533.

[r] Attorney General and Day, 1 Ves. 220; and see 3 Atk. 687.

[s] Hinton v. Hinton, 2 Ves. 632. S. C. Ambl. 277.

[t] Green v. Smith, 1 Atk. 573. Polexfen v. Moore, 3 Atk. 273.

[v] See Ib. and see Brome and Monk, 10 Ves. 597.

[w] Seton and Slade, 7 Ves. 274.

[x] Potter v. Potter, 1 Ves. 437. Gibson v. Lord Mountford, 1 Ves. 494.

[y] Paine v. Meller, 6 Ves. 352.

[z] See what Sir Thomas Sewell says in Fletcher v. Ashburner, 1 Bro. C. C. 497.

[a] Earl of Pembroke v. Bowden, 3 Ch. Rep. 115. S. C. 2 Vern. 52. Lechmere v. Earl of Carlisle, 3 P. Wms. 217.

by the Curtesy of it[b], though (a singular decision, constantly adhered to, but never approved[c],) a Wife cannot claim Dower out of it[d]. It passes as Land by Will[e]: and will not go as Money under a general bequest to a Legatee[f]. If, indeed, the Testator has described the Money, as so much Money agreed to be laid out in Land, it may pass under the Will as personal Estate, and by a Will not attested by three Witnesses; but without such a particular interposition of the Testator, manifesting his intention, it remains as Land, and belongs to the Devisee or Representative of the Real, not of the personal Estate[g].

If upon an Agreement for the purchase of an Estate, any casualty happen after the time appointed for the payment of the purchase Money[h], or as some cases say, between the Articles for the purchase and a Conveyance[i], the Purchaser bears the loss[k]; and, on the other hand, he will be entitled to any benefit which may accrue.

The same principles apply also as between the Representatives of the Vendor and Vendee; the

[b] Sweetapple v. Bindon, 2 Vern. 536. Otway v. Hudson, 2 Vern. 583. Chaplin v. Chaplin, 3 P. Wms. 232. Allen v. Allen, Mos. 123.

[c] See 3 P. Wms. 234.

[d] Crabtree v. Bramble, 3 Atk. 687.

[e] Green v. Smith, 1 Atk. 573. Lingen v. Sowray, Eq. Cas. Abr. 175. confirmed 3 P. Wms. 221.

[f] Lechmere v. Earl of Carlisle, 3 P. Wms. 221. in note.

[g] Vid. note C. to 3 P. Wms. 222. and the cases there mentioned, particularly Edwards v. Countess of Warwick, 2 P. Wms. 171; and see Wheldale v. Partridge, 8 Ves. 235. overruling Walker v. Denne, 2 Ves. Jun. 170, 172.

[h] 2 Atk. 400. Stint v. Bailey, 2 P. Wms. 220.

[i] White and Nutt, 1 P. Wms. 61; and see Pool v. Shergold, 2 Bro. C. C. 118. Paine v. Meller, 6 Ves. 349.

[k] 6 Ves. 349.

Death of either of the Parties to the Contract not affecting it[l]. The Heir of the Vendee, (even a collateral Heir[m],) is entitled to insist on the completion of a Contract to purchase Land, out of the personal Estate of his Ancestor[n], and this, though the Ancestor would have had an Estate Tail which he might have barred[o]; but if there is not a good title, he can neither claim the Estate, or the Money[p]. In like manner, where there is an effectual Agreement for the Sale of an Estate, by one then entitled[q], the Heir of the Vendor is bound to perform it; and the personal Representative may enforce it against the Vendee; and such personal Representative is entitled to the Purchase Money[r]; but where the Court holds the Contract cannot be performed, or ought not to be performed, though it might, there the real Estate belongs to the Heir of the Person contracting to sell[s]. If the Land agreed to be sold, be *Bo*

[l] Legard v. Hodges, 2 Ves. 478. Gill and Vermedun, 2 Freem. 199. Seton v. Slade, 7 Ves. 274. Winged v. Lifebury, 2 Eq. Abr. 32; and see Jackson against Lever, 3 Bro. C. C. 605. a very hard case; see also Lacon v. Mertins, 3 Atk. 1. and Potter v. Potter, 1 Ves. 437.

[m] Lingen v. Sowray, 1 P. Wms. 172. S. C. in Gilb. 91. and in 10 Mod. 39. Countess of Warwick and Edwards, 2 P. Wms. 271. approved, For. 90. Kettleby v. Atwood, 1 Vern. 299, 471. Vernon v. Vernon, 2 P. Wms. 223.

[n] Seton v. Slade, 7 Ves. 274. Buckmaster v. Harrop, 7 Ves. 341. and S. C. 13 Ves. 472. and see Langford and Pitt, 2 P. Wms. 629. Parsons and Freeman, Ambl. 116.

[o] Vid. 1 P. Wms. 719.

[p] Green v. Smith, 1 Atk. 573.

[q] 1 Anstr. 14.

[r] Baden v. Countess of Pembroke, 2 Vern. 315. Lacon v. Mertins, 3 Atk. 1. 7 Ves. 425.

[s] Attorney General v. Day, 1 Ves. 220.

rough English Land, the younger Son, after the death of the Father, will be bound to carry the Agreement into effect[t]; and in all cases of this description, the Creditors of the Bargainor may compel the Heir to convey the Land[v]. Such is the converting effect of a mere Agreement, that a Covenant by a Joint-tenant to sell, severs the Joint-tenancy in Equity, though not at Law[w]. And where a Surrender by a Copyholder, would bar the Widow's Free Bench, a Contract to sell or Surrender, has the same effect[x].

If a Tenant for Life, having a power to grant, covenants to make such a grant; this will, in Equity, bind the Remainder-man, it being in the nature of an execution of a Power.

So, if a Tenant for Life agrees to make a Lease pursuant to his power, the Remainder-man is bound[y]. And in like manner, contracts for Jointures, will bind the Remainder-man, though made only in pursuance of a Power to make Jointures. Contracts for a valuable consideration to execute a Power, or to make a charge of any description under a power, are also binding on the Remainder-man[z].

A *parol Agreement* for a Lease made by a

[t] Hinton v. Hinton, 2 Vern. 640.

[v] Best and Stamford, 1 Salk. 154.

[w] Browne v. Raindal, 3 Ves. 257. and see Partriche v. Powlet, 2 Atk. 54. contra dict. 2 Vern. 62.

[x] Hinton v. Hinton, Ambl. 277. S. C. 2 Ves. 633. overruling Musgrave v. Dashwood, 2 Vern. 63.

[y] Shannon v. Bradstreet, 1 Sch. and Lefr. 52.

[z] Ib. 60.

Tenant for Life, in pursuance of a Power, if *partly* performed, might be enforced against the *Tenant for Life;* but it seems questionable, whether it could be enforced against a *Remainder-man;* for though the Tenant for Life is bound, it is principally, as will be seen, on the ground of Fraud, which is personal, and which does not apply to the Remainder-man [a]."

If the Remainder-man, after the death of the Tenant for Life, acquiesced, it would be different [b].

Upon the same principle that what is agreed to be done is considered as done, it has been holden that, the personal Estate of a Man, who in consideration of Marriage with an Orphan of a Citizen of London, covenanted to take up his Freedom of the City, should be divided according to the Custom, in the same manner, as if the freedom had been taken up in performance of his Covenant [c].

It has been said, that *in general*, it is a Rule that what is contracted to be done for a valuable consideration, is considered as done [d], and it seems proper so to qualify the Rule; for though it operates in the various instances that have been mentioned, it is not without its exceptions. An Agreement, for instance, to convey, does not affect a subsequent Purchaser, without notice of the

[a] Shannon v. Bradstreet, 1 Sch. and Lefr. 72.

[b] Ib. 73. Styles v. Cowper, 3 Atk. 692.

[c] Frederick v. Frederick, 1 P. Wms. 710. S. C. 1 Str. 455. and 4 Bro. P. C.

[d] Ante, p. 289.

Agreement[e]; nor has a Covenant to levy a Fine[f], or to suffer a Recovery[g], the same effect as a Fine or Recovery levied or suffered; but if the Covenant relates to an Entail in Equity, the Court will force the Heir to comply with a bargain made by his Ancestor[h]. Nor does the Rule hold, in regard to Dower, the Wife not being entitled to it out of an Estate, agreed only to be purchased by, and not actually conveyed to her Husband[i]. So, if a Body corporate, having a Power, make an Agreement for the Renewal of a Lease, and the fine is paid, and a new member is introduced amongst them, it may be doubtful, whether the Agreement could be enforced against such new Member[k]. He would certainly be entitled to his proportion of the Fine, paid on the Renewal[l].

With these preliminary remarks on the effect of a mere Agreement in Equity, we may now proceed to consider, *what Agreements will be decreed*

[e] Echliffe v. Baldwin, 16 Ves. 267. and see dict. in Ramsden v. Hylton, 2 Ves. 309. Finch and Earl of Winchelsea, 1 P. Wms. 279.

[f] See Frederick v. Frederick, 1 P. W. 720; see also Prec. Ch. 279. and 425. and 2 P. Wms. 626, 652. 2 Vern. 306; and see Lord Coventry's Case, best reported, at the end of Francis's Maxims in Equity.

[g] See Collins and Plummer, 1 P. Wms. 104. and Lord Coventry's Case at the end of Francis's Maxims in Equity, Attorney General and Day, 1 Ves. 223. Cotter and Layer, 2 P. Wms. 625. and what is said in Holt v. Holt, 2 P. Wms. 626. and 1 Atk. 9. Ambl. 278. 1 Dick. 34. 3 Bro. 538.

[h] See 1 Vern. 13, 440. 2 Vern. 133, 702. and the cases cited before in note 4.

[i] See Crabtree and Bramble, 3 Atk. 687.

[k] See Dr. Wynne v. Bampton, 3 Atk. 476.

[l] Ib.

to be specifically performed. The general Rule seems to be, that such Agreements must be according to the *forms* prescribed by Law, and between Parties, *able* and *willing* to contract, and that the Agreement must, also, be *certain* and *defined*, *equal* and *fair*[m].

The doctrine in Equity as to the *ability* of Parties to contract, is, in general, governed by the Rules of Law on that subject, except in regard to *Infants* and *Feme coverts.* The doctrine as to Infants has already been adverted to, and the contracts of Feme coverts, will be observed upon hereafter. It is not, therefore, necessary to enlarge upon that topic, except only to observe, that a specific performance of an Agreement will be decreed against one, who after the Agreement becomes a Lunatic, if the legal Estate is vested in Trustees, but not if the legal Estate is vested in the Lunatic himself[n].

With regard to the *forms* required by Law in Agreements, it is to be observed, that a *Parol* Agreement concerning *personal Estate* to any extent, if reasonable and proved, is binding, and may be discharged by Parol[o]; but in general, a Bill will not lie for a specific performance of contracts *for Chattels,* or which relate to *Merchandize;* as a Bargain for *Corn*[p], or for *Stock;* for damages in these cases may, with equal advantage, be recovered in an Action, and Corn or Stock

[m] Vid. Lord Walpole v. Lord Oxford, 3 Ves. 420. Buxton and Lister, 3 Atk. 385. Underwood and Hitchcox, 1 Ves. 279.

[n] Owen v. Davis, 1 Ves. 82.

[o] Gibbons v. Caunt, 4 Ves. 847, 8, 9.

[p] Cud and Rutter, Vin. Abr. tit. Contract and Agreement, (M.) C. 21. S. C. 1 P. Wms. 570.

bought [q]. Such cases, therefore, are left to be decided at Law [r]. *Sir Joseph Jekyll* decreed a specific performance, in the case of a Chattel [s]; but *Lord Macclesfield* reversed his decree, and from that time, the Rule of the Court has been not to retain such a Bill [t]. Cases of contracts for the purchase of Lands, or things that relate to Realty, are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the Land, and is quite a different thing from matters in the way of Trade. But notwithstanding this general distinction between personal Contracts for Goods, and Contracts for Lands, there are cases where persons may enforce a specific performance of Agreements relating to Personalty [v]; but the Court will weigh with great nicety, cases of this kind [w]: as where there were Articles for the Sale of 800 ton of Iron, to be paid for by Instalments, in a certain number of years, a specific performance was decreed [x]. So, if a Man contract for the purchase of a great quantity of Timber, as a Ship Carpenter, by reason of the vicinity of the Timber; or if a Man wanting to clear his Land, agrees to sell his Timber, in order to apply the Land to a particular sort of Husbandry; in these cases, as nothing can answer the Justice of the Case, but the performance of

[q] See Nutbrowne v. Thornton, 10 Ves. 161; and see Mason and Armitage, 13 Ves. 37.

[r] Buxton v. Lister, 3 Atk. 383.

[s] In Cud v. Rutter, 1 P. Wms. 570.

[t] 3 Atk. 383. and see Capper v. Harris, Bunb. 135.

[v] See Buxton v. Lister, 3 Atk. 384.

[w] Ib. 385.

[x] Taylor v. Neville, mentioned, 3 Atk. 384.

the Contract *in specie*, a specific performance, it seems, will be decreed [y].

By the Statute (29 *Car.* 2. *c.* 3. *s.* 4.) no action shall be brought, whereby to charge a person upon any Agreement made upon consideration of Marriage, or upon any Contract or Sale of Lands, Tenements, or Hereditaments, or any interest in or concerning the same, unless the Agreement upon which such action shall be brought, or some Memorandum or Note thereof, is in Writing, and signed by the party charged therewith, or some other person thereunto by him lawfully authorized.

The reason of this provision, in respect to Marriage, seems to be, that in no case can there be supposed so many unguarded expressions and promises used, as in addresses in order to Marriage, where many passages of Gallantry usually occur [z]. An Agreement, therefore, made by the Husband before Marriage, and not reduced into Writing, is within the Statute [a].

Nor will a written recognition *after* the Marriage, of a Parol Promise before Marriage, take the case out of the Statute [b].

But a *Letter* containing the terms of a Marriage Agreement takes the case out of the Statute [c].

[y] See Buxton v. Lister, 3 Atk. 385. That an Agreement for the Sale of Timber need not be in writing, see 1 Lord Raym. 182. but see Crosby and Wadsworth, 6 East. 602. and also 11 East. 362.

[z] Vid. what is said Arg. in Montacute v. Maxwell, 1 P. Wms. 619.

[a] Montacute v. Maxwell, 1 P. Wms. 618.

[b] Randall v. Morgan, 12 Ves. 73; but see Hodgson v. Hutchinson, Vin. Abr. tit. Contract and Agreement, (H.) Ca. 34.

[c] Bird v. Blosse, 2 Ventr. 361. Moore v. Hart, 2 Ch. Rep. 147. Wankford v. Fotherby, 2 Vern. 322.

Marriage, however, is not considered as a part performance of a parol agreement, made before Marriage, so as to take it out of the Statute of Frauds [a].

Sales by Auction are within the Statute of Frauds [b], except Sales under a Decree [c].

Indeed, wherever the substance of the statute has been complied with in the material part, the forms have never been much insisted on [d].

If, therefore, a *Letter* contains the terms of the Agreement, or if it refers to another Paper, which contains the Terms, parol Evidence will be admitted to shew what was the thing so referred to [e], and renders it a sufficient written Agreement [f]; and a Letter has been held binding, though the Person did not intend to be bound [g]: and even a Letter sent to an Agent [h], or other third person [i], has been considered as a sufficient signing within the Statute. Whether a note, written in the third person, viz. "Mr. T. proposes, &c." (making thereby an offer to purchase), amounts to a

[a] Montacute v. Maxwell, 1 P. Wms. 618. Taylor v. Beech, 1 Ves. 297; and see dict. Redding v. Wilks, 3 Bro. C. C. 400. Dundass and Dutens, 1 Ves. Jun. 199.

[b] Blagden v. Bradbear, 12 Ves. 466.

[c] Attorney General v. Day, 1 Ves. 218.

[d] Welford v. Beazely, 3 Atk. 503.

[e] Clinan v. Cooke, 1 Sch. and Lefr. 33. overruling what is said in Binstead v. Coleman, Bunb. 65. and the dictum in Parteriche v. Powlett, 2 Atk. 383; and see Brodie and St. Paul, 1 Ves. Jun. 326.

[f] Tawney against Crowther, 3 Bro. C. C. 161, 319.

[g] Welford v. Beezely, 1 Ves. 8. S. C. 3 Atk. 503. see what is said 3 Taunt. 172.

[h] 1 Ves. 8.

[i] Moore v. Hart, 1 Vern. 110. Welford and Beazeley, 3 Atk. 503. Cooke v. Tombs, 2 Anstr. 420.

contract in Writing signed within the Statute of Frauds, is not decided [k].

Where there is a compleat Agreement in writing, and a person who is a Party and knows the contents, signs as a Witness only, this has been held a sufficient signing within the Statute [l]; but altering the draft of the conveyance, has not been considered to amount to a signing of the Agreement [m]; and though the Party writes the Agreement, it is ineffectual, unless it be also signed [n].

With respect to the *signing* of an Agreement, by an Agent *lawfully authorized*, it has been holden, that the authority of the Agent need not be in writing [o].

An Auctioneer, on the Sale of Estates by Auction, is considered as the Agent of both Parties, the Seller and the Buyer; and his *receipt*, if it contains in itself, or by reference to something else shews, what the Agreement is, has been considered as a note or memorandum sufficient to satisfy the requisition of the Statute [p].

There are, however, Cases where, though an Agreement as to Lands is not in writing, it will be decreed to be performed; as where a parol Agreement has been *partly performed*, and is

[k] Morison v. Turnour, 18 Ves. 175.

[l] Welford v. Beazely, 3 Atk. 503; and see Coles v. Trecothick, 9 Ves. 234.

[m] Hawkins v. Holmes, 1 P. Wms. 770.

[n] Bawdes v. Amhurst, Prec. Ch. 402.

[o] Waller v. Cox, Vin. Abr. tit. Contract and Agreement (H.) Ca. 45. Coles v. Trecothick, 9 Ves. 250. Clinan v. Cooke, 1 Sch. and Lefr. 31. The note in 7 East, 565, stating that the Agent's Authority must be in writing, is a mistake.

[p] Coles v. Trecothick, 9 Ves. 252. S. C. MS. Emmerson v. Heelis, 2 Taunt. 38.

admitted, or proved [q], as it may be in such cases, by parol Evidence produced on the hearing of the cause [r], or, on some occasions, before the Master [s].

In these cases, relief is administered on the ground of Fraud [t], in suffering the Party to proceed on the Agreement, and then, unconscientiously, insist on its imperfection, and is a species of Fraud cognizable only in Equity [u]. It is true, *Mr. Justice Buller* observed, in one or two cases [v], that part performance takes a case out of the Statute, *at Law*, as well as in *Equity*; but he afterwards abandoned so untenable a position [w].

Common Law Judges, (with deference be it said) have never shone greatly in Courts of Equity. It is not their proper sphere of exertion. The doctrines of Equity cannot be well understood, but by long study, and continual practice. *Lord Eldon*, speaking of Mr. Justice Buller, observed, " With all the veneration and respect due to so great a judicial character, the point in which it seems to have failed, is, that he thought too

[q] See Daniel v. Davidson, 16 Ves. 249.

[r] 1 Ves. 221.

[s] Allan v. Bower, 3 Bro. C. C. 149. S. C. noticed 1 Sch. and Lefr. 37. Boardman v. Mostyn, 6 Ves. 467. but see 3 Bro. C. C. 149. and 1 Ball and Beatty, 265. and Savage against Carroll, 1 Ball and Beatty, 551. in which case it is laid down that an Inquiry or Issue is only directed, where from contradictory Evidence a doubt arises in the mind of the Court, or Witnesses being discredited after the case has been proved, that an Inquiry or Issue is directed.

[t] 1 Sch. and Lefroy, 130.

[u] 1 Bro. C. C. 417.

[v] Brodie v. St. Paul, 1 Ves. jun. 333; and see 1 Bro. C. C. 417.

[w] See what is said in Cooth v. Jackson, 6 Ves. 39. O'Herlihy v. Hedges, 1 Sch. and Lefr. 123.

confidently, that he understood all the doctrine of the Court of Equity [x]."

The first case in which relief was given on the ground of part-performance, is frequently said [y] to have been *Foxcraft* v. *Lyster* [z]; but from some Reports of that Case [a], it rather seems to have proceeded on another, and a very indisputable ground; on the fraud of the Heir, in preventing the Lessor, who was dying, executing a Lease. Certain it is, however, that very soon after the passing of the Statute of Frauds [b], this species of equitable relief was administered; but whether wisely, or not, has, sometimes, been questioned.

If, therefore, it be clearly shewn, what the Agreement was, and that it has been *partly performed*, that is, that an act has been done, not a mere voluntary Act [c], or merely introductory or ancillary to the Agreement [d], but a part execution of the substance of the Agreement, and which would not have been done unless on account of the Agreement [e], an Act, in short, unequivocally referring to, and resulting from, the Agreement; and such, that the Party would suffer an Injury, amounting to Fraud [f], by the Refusal to execute that Agree-

[x] Marquis of Townshend v. Stangroom, 6 Ves. 333.

[y] See what Lord Redesdale says, Bond and Hopkins, 1 Sch. and Lefr. 433. and Mitford's Treatise.

[z] Cited 2 Vern. 456.

[a] See the Report of the case, in Gilbert's Eq. Reports, p. 11. and Colles' Parl. cases, 108.

[b] 29 Ch. 2. c. 3.

[c] As in Robertson against St. John, 2 Bro. C. C. 140.

[d] See 1 Bro. C. C. 412. Lacon v. Mertins, 3 Atk. 4.

[e] Cooke v. Tombs, 2 Anstr. 424. Gunter against Halsey, Ambl. 586.

[f] Clinan v. Cooke, 1 Sch. and Lefr. 41.

ment: in such Case, the Agreement will be decreed to be specifically performed [g].

Wherever, therefore, a parol Agreement is sought to be established on the ground of part performance, if the Statute is pleaded, the answer must deny the acts of part performance [h].

The ground on which the Court acts in these cases is, as before observed, *Fraud*, in refusing to perform, after performance by the other Party [i]; and not because the Agreement was not within the original conception of the Statute [k]. The allowing any other construction upon the Statute of Frauds would be to make it a guard and protection to Fraud, instead of a security against it, as was its design and intention [l].

It was the opinion of *Lord Alvanley*, that the Court had gone rather too far, in permitting part performance and other circumstances, to take cases out of the Statute, and then, unavoidably perhaps, after establishing the Agreement to admit parol evidence of the contents of that Agreement. "Part performance might be evidence of some Agreement, but of what must be left to parol Evidence. I always thought," says he, "the Court went a great way. They ought not to

[g] Gunter v. Halsey, Ambl. 586. Vid. Fraine and Dawson, 14 Ves. 386. and Lewis and Clitherow, MS. The case contra. Hollis and Whiting, 1 Vern. 151. cannot be considered as Law.

[h] Bowers v. Cator, 4 Ves. 91. Wills v. Stradling, 3 Ves. 378.

[i] Whitbread against Brockhurst, 1 Bro. C. C. 413. Hare v. Shearwood, 1 Ves. jun. 243. Buckmaster v. Harrop, 7 Ves. 346.

[k] 1 Bro. C. C. 413, 417.

[l] Walker v. Walker, 2 Atk. 100.

have held it Evidence of an unknown Agreement, but to have had the Money laid out, repaid. It ought to have been a Compensation. Those cases are very dissatisfactory. It was very right to say, the Statute should not be an engine of Fraud: therefore compensation would have been very proper. They have, however, gone farther; saying, it was clear, there was some Agreement, and letting them prove it: but how does the circumstance of a Man having laid out a great deal of Money, prove that he is to have a Lease for ninety-nine years? The common sense of the thing would have been to let them bring an Action for the Money. *I should pause upon such a case*[m]." Impressed, probably, with similar feelings, *Lord Eldon*, early in that judicial career which has immortalized him as a Lawyer, expressed a determination not to go one *iota* further than the cases[n].

The cases are numerous in regard to what acts are to be considered as a part performance[o].

If the Vendee, on a parol Agreement for the Sale of Lands, *is let into Possession* by the Vendor, this has been held to amount to a part performance[q]; *à fortiori*, if the Party enters and improves

[m] Foster v. Hale, 3 Ves. 712. etc; and see what is said in Wills v. Stradling, 3 Ves. 382. and in Attorney General v. Day, 1 Ves. 221.

[n] Cooth v. Jackson, 6 Ves. 32, 37; and see what is said by Lord Redesdale, in 2 Sch. and Lefr. 5.

[o] See 3 Ves. Jun. 39. and the cases there cited.

[q] Butcher v. Stapely, 1 Vern. 365. Pyke v. Williams, 2 Vern. 455. Wheeler v. Newton, Prec. Ch. 16. Lockey v. Lockey, Prec. Ch. 519. 2 Str. 783. and the cases cited in the note, 1 Atk. 12; and see Lacon v. Mertins, 3 Atk. 4.

them[r], or builds[s]; and if what was the parol Agreement clearly appears, it will be enforced[t].

The *payment of Money*, either in part, by way of earnest, or, in full, for the purchase, is not, it seems, deemed a part performance[v]; but the cases are contradictory. In some, it has been holden that if a *substantial part* of the purchase Money is paid, that is a part performance, but that a *small sum* paid, the twentieth part of the purchase Money, for instance, is not[w]; but *Lord Redesdale* appears to have thought, that payment of the purchase money will, *in no case*, amount to a part performance[x]. Giving of *Directions for Conveyances*, and *taking a view of the Estate*, have been resolved, not to be a *part performance*[y].

Putting of a Deed into the hands of a Solicitor to prepare a Conveyance, is not a part performance of a parol Agreement to convey[z].

And where there was a parol Agreement for a compromise, and a division of the Estate by Arbitration, acts done by the Arbitrators towards the execution of their duty, such as surveying, &c. were not considered as acts of *part performance*[a].

[r] Hawkins v. Holmes, 1 P. Wms. 770.

[s] Savage and Foster, 2 Mod. 37.

[t] Boardman v. Mostyn, 6 Ves. 470.

[v] Lord Pengall and Ross, 2 Eq. Abr. 46. Leake and Morris, 2 Ch. Cas. 135. Seagood and Meale, Prec. Ch. 560. but see Freeman 281. and the authorities mentioned in the note to Clinan v. Cooke, 1 Sch. and Lefr. p. 40. and same book, p. 129.

[w] See Maine v. Melbourne, 4 Ves. 720. Lacon and Mertins, 3 Atk. 4.

[x] Clinan v. Cooke, 1 Sch. and Lefr. 40. and the cases mentioned in note (a).

[y] Clerk v. Wright, 1 Atk. 12.

[z] Redding v. Wilkes, 3 Bro. C. C. 400. Cook v. Tombs, 2 Anstr. 425.

[a] Cooth v. Jackson, 6 Ves. 41.

If a Bill be filed for the Specific Performance of a parol Agreement, and the Defendant admits the Agreement, and submits to perform it, it will of course be decreed [b].

But if there be a Plea of the Statute of Frauds, and no parol Agreement confessed by the answer, the Court has in no case compelled the Defendant to execute it [c].

And though the Agreement is admitted by the answer, (and it seems it must be admitted or denied [d],) yet, if the Defendant insists upon the Statute of Frauds, a Specific Performance will not be enforced [e]. But if the Defendant admits the parol Agreement, and does not insist on the Statute, he is taken to have renounced it, and a Specific Performance will be decreed [f].

It seems questionable, whether an Agreement for a *separate Maintenance*, will be enforced, where such Agreement rests in articles between the Husband and the Wife. The Spiritual Court, being considered as having exclusive cognizance of the rights and duties arising from the state of Marriage.

[b] Ambl. 586. Spurrier v. Fitzgerald, 6 Ves. 548.

[c] Whitchurch against Bevis, 2 Bro. C. C. 567. Whaley v. Bagenal, 6 Bro. P. C. 45.

[d] See Child and Godolphin, mentioned 2 Bro. C. C. 556, and the principal case.

[e] Rowe v. Teed, 14 Ves. 375. Cooth v. Jackson, 6 Ves. 39. Blagden v. Bradbear, 12 Ves. 471. Prec. Ch. 208. Gilb. Eq. Cas. 35. contra Child v. Godolphin, 1 Dick. 39.

[f] Cooth v. Jackson, 6 Ves. 37; and see Moore v. Edwards, 4 Ves. 24. Whitchurch against Bevis, 2 Bro. C. C. 559. Whitbread against Brockhurst, 1 Bro. C. C. 416. Attorney General v. Day, 1 Ves. 220, 1. but see Croyston and Banes, Prec. Ch. 260. S. C. 1 Eq.

The Court has never decreed an establishment of a separation between Husband and Wife, and compelled a Husband to pay a separate maintenance to his Wife[5], without some *Agreement* for

Abr. 19. Symondson v. Tweed, Prec. Ch. 374. S. C. 1 Eq. Abr. 19.

[5] During the Usurpation the Court of Chancery exercised a Jurisdiction in cases of alimony, there being then no spiritual courts, nor any toleration of the civil law; but upon the reestablishment of courts christian, the Court of Chancery no longer retained this Jurisdiction; insomuch, that when afterwards a Bill was brought for Alimony in the Court of Chancery, a demurrer was allowed. Vid. 2 vol. Shower's Rep. p. 283. and the cases there cited.

From the decision of the Lords Commissioners in cases of alimony, an appeal lay to the Protector.

In a tract published in 1654, entitled, "Alimony arraigned, or the Remonstrance, &c. printed in 1654, Q°." there is given the petition to the Lords Commissioners and the decree of the Commissioners. The mode of proceeding on these occasions appears on the face of the decree.

"Lords Commissioners. Saturday, 24th of July 1652. between Theodosia Ivie, plaintiff, and Thomas Ivie, her husband, defendant.

Whereas, the Plaintiff having exhibited her petition (against the Defendant her husband,) to be relieved for alimony, unto which, the defendant having put in his answer, divers witnesses were examined by Commission, and others were, (by their Lordships' directions,) also examined by the Register, in the presence of counsel on both sides; and for the better clearing of the matters, and satisfaction of their Lordships, therein; their Lordships were also pleased themselves to examine several witnesses, viva voce, and the cause having taken up many days in hearing (after much debate, and pains spent herein; and upon full and deliberate hearing of what could be offered on both sides; and upon reading of the said depositions, and of the indenture, made upon the marriage, whereby the estate of the Plaintiff's father is settled upon Sir John Brampstone, Knight, and Wm. Booth, Esq. to the uses in the said indenture declared,) their lordships were fully satisfied that there is good cause to give allowance for alimony to the Plaintiff; and do order and decree, that the Plaintiff have paid unto her, the sum of £300 by the year, which their Lordships intend to be had and raised out of the Plaintiff's father's estate, so settled in the said trustees as aforesaid until further order. And do therefore order, that the said Defendant, and the said trustees, shall authorise, or permit and suffer the Plaintiff, or whom she shall nominate and appoint, from time to time,

that purpose; but *Lord Hardwicke* seems, though reluctantly, to have thought such an Agreement might be decreed[h]; and there are cases which enforce that doctrine[i].

In one case, and after great consideration, it was determined that, *articles of separation* may be specifically enforced, at the suit of the *Wife*, and this, though the Husband offered, by his answer, to receive his wife again[k]; but that decision has been disapproved by subsequent Chan-

quietly, and without interruption, to receive the rents and profits of the said lands: and the several tenants of the premises are hereby ordered to pay the same accordingly, from our Lady-day last; and the said trustees, and the said tenants, in so doing, are to be saved harmless, by the decree of the court. But in case the said lands are in a greater yearly value, than the said £300 per annum; and that the said Defendant, shall at any time, signify so much unto their lordships, and undertake and sufficiently secure the payment of £300 per annum (quarterly, unto the said Plaintiff by equal portions, to begin from our Lady-day last, then the said defendant is hereby decreed to pay unto the said plaintiff, the said yearly sum of £300 accordingly, until further order as aforesaid. And that the said trustees are in such case to permit and suffer the said defendant and his assigns to receive and enjoy the rents and profits of the said father's estate, (any thing herein contained to the contrary in anywise, notwithstanding.) Rob. Dod, Dep. Regis. The defendant considered himself as much aggrieved by this decree, and brought an action against a Mr. Williamson, who detained his wife, and under the directions of Lord Ch. Justice Roles, obtained a verdict for £100, and an execution afterwards issued; but he filed his bill in Equity, for an injunction, and it was obtained, and thereby the plaintiff and others were enjoined, under the penalty of £500, against proceeding on the judgment. Upon this, the plaintiff petitioned, "the Parliament for the commonwealth of England;" but what was done upon this petition, does not appear.

[h] Lady Head v. Sir Francis Head, 1 Ves. 17. S. C. 3 Atk. 550.

[i] See for instance, Angier and Angier, Gilb. Eq. Rep. 152,3. S. C. Prec. Ch. 496. Lex Prætoria, MS.

[k] Guth v. Guth, 3 Bro. 614: and see Fitzer v. Fitzer, 2 Atk. 511.

cellors[l], though not positively overruled. Those marriage cases in which the Court has acted upon an Agreement to separate, have been, in general, where a *third party* has intervened, and the agreement was not merely between the Husband and Wife[m]; or where a fortune has accrued to the Wife after separation[n]; or where there has been Trust Property, obtainable only in a Court of Equity[o]. The *Wife*, certainly, is not bound in any degree by a deed of separation, and a specific performance could not be enforced as against her[p].

Articles of separation are put an end to by Reconciliation[q]; and as against Creditors, it seems, the Court will never decree an agreement for a separation[r], unless in those cases where Trustees undertake to indemnify the Husband against the debts of the Wife, for that forms a valuable consideration[s].

[l] See Legard v. Johnson, 3 Ves. 361. Lord St. John v. Lady St. John, 11 Ves. 532; and see Wilkes v. Wilkes, 2 Dick. 791.

[m] Sterling v. Crawley, 2 Vern. 385. Stephens and Olive, 2 Bro. C. C. 90. Compton against Collinson, ib. 386: and see the observation, in Legard v. Johnson, 3 Ves. 359. and in Lord and Lady St. John, 11 Ves. 532. see also Cooke v. Wiggins, 10 Ves. 191.

[n] Ball and Montgomery, 2 Ves. 360; and see the observation in Legard and Johnson, 3 Ves. 360.

[o] Sidney v. Sidney, 3 P. Wms. 269. observed on in Legard and Johnson, 3 Ves. 350. 360.

[p] See Lord St. John v. Lady St. John, 11 Ves. 533.

[q] Lord St. John v. Lady St. John, 11 Ves. 537.

[r] Lord Hardwicke expressed a doubt as to this in Fitzer v. Fitzer, 2 Atk. 514; but see the observations and decision in Legard v. Johnson, 3 Ves. 361.

[s] Stephens v. Olive, 2 Bro. C. C. 90. and King v. Brewer, cited ib. p. 93, in note.

A *parol Agreement* for an equality of partition, entered into between persons who had a right to contract, and accordingly put in execution, will, though of long standing, be established. And if a Joint-tenant upon equality of partition, thinks proper to accept of a contingent, uncertain advantage, where one moiety of the Land is of superior value to the other, it will not vacate the Agreement[a]; but the Agreement of the Husband will not bind the Inheritance of his Wife[b].

A Covenant to *renew a Lease*, at the request of the Lessee within the Term, will be enforced, even in favor of the Executor of the Lessee who died before any request made[c].

A clear contract for the *perpetual renewal* of a Lease for *Lives*[d], or for *Years*, will be specifically executed; but a Covenant at the expiration of one Lease for twenty-one years, to make a new Lease, "with all Covenants, Grants, and Articles, as in the former Lease contained," will not be allowed to operate as a Covenant for perpetual Renewal[e].

It has been holden, that upon a Bill for the specific performance of an Agreement for a Lease, the Court cannot apportion the price according to the time already expired[f]; but, it appears, that

[a] Ireland v. Rittle, 1 Atk. 542.

[b] Ib. Sed. vid. Co. Litt. 171. a.

[c] Hyde v. Skynner, 2 P. Wms. 196.

[d] Furnival and Crew, 3 Atk. 83.

[e] Moore v. Foley, 6 Ves. 232. Iggulden v. May, 9 Ves. 325. and see 3 vol. Hargrave's Jurisconsult Exercitations, on the subject of this case. Bridges v. Hitchcock, 1 Bro. P. C. 522. Bettesworth against Dean of St. Paul's, 3 Bro. P. C. 389. Somerville v. Chapman, 1 Bro. C. C. 63. Tritton against Foote, 2 Bro. C. C. 636. Russell v. Darwin, mentioned in note to 2 Bro. C. C. 639.

[f] King v. Wightman, 1 Anstr. 80.

where the Vendor of a Lease has continued in possession, and in consequence of a Suit, time has elapsed, Interest will be ordered to be paid by the Purchaser, on his Purchase Money; and Rent in respect of his Possession, by the Vendor[g].

It has long been determined, that a Man may be decreed to procure his Wife to acknowledge a fine of mortgaged Lands[h]; or to procure his Wife to join in a Surrender of a Copyhold: and with this doctrine, recent cases agree[i]. And if a Feme Covert agrees to join with her Husband in making a Surrender, or in levying a Fine, and he dies before it is done, a Court of Equity will compel her to perform the Agreement[k]; her conscience being bound.

So, if a Husband possessed, in right of his Wife, of a *term of years*, agree with another, for an under Lease, but dies before the Lease is executed, the Agreement will yet be specifically performed against the Wife[l].

If a Husband covenanting for his Wife, states an absolute impossibility to perform his Covenant, and offers to put the Party in the same situation as if the Agreement had never taken place, the

[g] Dyer v. Hargrave, 10 Ves. 505.

[h] Rust v. Whittle, Tot. 94. and Griffin v. Taylor, ib. 106.

[i] Morris v. Stephenson, 7 Ves. 474; and see Hall v. Hardy, 3 P. Wms. 187. and Barrington v. Horne, 2 Eq. Abr. 17. Pl. 7. 5 Vin. 547. the case of a Fine agreed to be procured; see also Berry v. Wade, Finch. p. 180.

[k] Baker v. Child, 2 Vern. 61. Sed vid. what is said of that case, Eq. Cas. Abr. 62. pl. 2.

[l] Steed against Cragh, 9 Mod. 43. Druce v. Dennison, 6 Ves. 394, 5.

Agreement, it seems, would not be attempted to be enforced [m].

In one case the Husband was decreed to join in a Conveyance, and procure his Wife so to do; and to induce him, an alternative was added, viz. that if he did not in the time and manner directed by the Master, perform it, he should account to the Plaintiff for the Money received in respect of the Agreement [n].

It seems, however, very doubtful, whether under a Contract by a Husband alone, to sell the Estate of his Wife, the Court would decree him to procure her to join [o]. *Lord Cowper* refused to enforce a specific performance of a Covenant by a Husband, that his Wife should levy a Fine [p].

In one case, it is laid down that if a Husband agrees by articles under his hand to convey his Wife's Lands to *B.*, *B.* may prefer his Bill against the Husband and Wife to compel a specific execution of this Agreement, and if the Wife upon private examination consents, the Court will decree it; but it was doubted, whether the Court would decree a specific performance, if the Bill be preferred against the Husband only, because, if the Court should compel the Husband to convey, the Husband would compel the Wife, who is under his power; and the Wife ought not by Law to

[m] See Outread v. Round, 4 Vin. Abr. 203. pl. 4. Morris v. Stephenson, 7 Ves. 478.

[n] See Sedgwicke v. Hargrave, 2 Ves. 57.

[o] Gilbert's Lex Prætoria, 245. Emery v. Wase, 5 Ves. 848. S. C. on Appeal, 8 Ves. 848.

[p] Outread v. Round, Vin. Abr. tit. Baron and Feme, (H. b.) Ca. 4. S. C. 2 Eq. Abr. 145.

convey by means of any compulsion from the Husband [q].

The specific performance of Covenants is frequently sought in Equity; and where a Person *seized of Lands*, agrees by Articles, to settle Lands of a certain value, the Articles have been held to be a lien on the Lands, of which such person was then seized, though no particular Lands were mentioned in the Articles [r].

So, where Tenant for Life, with power to make a Jointure of £500, in consideration of Marriage, and of £10,000, covenants to make such Jointure, but dies without doing it, it has been held that the Articles are a *lien* on the Estate, and that by the execution of them, the Covenantor became a Trustee for the Feme [s].

Where a Husband is bound by his Covenant, or his Trustees are bound with his consent, and with his Money, to purchase and settle Lands, and he does purchase Lands of *less* [t], *equal* [v], or *greater* value than the Sum he covenanted to lay out [w]; but does not settle it, he is (unless the Land be *Copyhold* [x],) presumed to have made the purchase for the purpose of the Settlement [y]; for it is a

[q] See Wheeler and Newton, Gilb. Eq. Rep. S. C. Prec. Ch. 16. Gilb. Lex Prætoria, MS. and see Davis v. Jones, 1 New Rep. 267.

[r] Roundell v. Breary, 2 Vern. 482. confirmed, 3 Atk. 327, 9. Coventry v. Coventry, Gilb. 108.

[s] Lady and Lord Coventry, 2 Mod. 19.

[t] See 2 Atk. 635. Lechmere and Carliste, 3 P. Wms. 228.

[v] Wilcox v. Wilcox, 2 Vern. 558. relied on 2 Atk. 634, Deacon v. Smith, 3 Atk. 323.

[w] See Garthshore v. Chalie, 10 Ves. 9.

[x] Attorney General and Whorewood, 1 Ves. 541.

[y] Lench v. Lench, 10 Ves. 516; see also Wilson and Fore-

Rule that where a Man is bound to do an Act, and he does what may enable him to do the Act, it is taken to have been done by him with the view of doing that which he was bound to do [z].

The reason why it is held a satisfaction in these cases, seems to be, that the Court will not draw out of the Personal Estate to the prejudice of the Widow and younger Children, a Sum of Money, which would be a double Provision for the eldest Son [a].

These cases of satisfaction, however, depend upon the Intent of the party, and Evidence is admissible to shew, that a purchase was not made in performance, or part performance of the Covenant [b]. If the Purchaser sells or mortgages the Lands, it will be considered as Evidence that they were not meant to be in satisfaction of the Covenant [c]; but a *Devise* will not have such construction [d].

In one case it was held that, if there be a contract *to settle a particular Estate*, and there is a breach of the contract, it is a question of damages, and an issue must be directed to try what the damages are, in which it was said to differ from a contract *to purchase Lands*, in which case Lands

man, imperfectly reported in 2 Dick. 593. but stated from the Register's Book, 10 Ves. 519, 520. Lechmere and Lechmere, For. 80.

[z] Sowden v. Sowden, 1 Bro. C. C. 583. S. C. mentioned in note, 3 P. Wms. 228. Letchmere v. Letchmere, Forester 80. and see Weyland v. Weyland, 2 Atk. 634.

[a] See Lee and Cox, 3 Atk. 421.

[b] Garthshore v. Chalie, 10 Ves. 10.

[c] Deacon v. Smith, 3 Atk. 326.

[d] Tooke v. Hastings, 2 Vern. 97.

would be decreed to be purchased[e]; but previous cases appear to have established it as the doctrine of the Court, that, though a Covenant to settle or convey particular Lands, would not, at *Law*, create a lien upon the Lands; yet, in *Equity*, such a Covenant, if for a valuable consideration, would be deemed a specific lien on the Lands, and a performance of the covenant decreed against all persons claiming under the Covenantor, except Purchasers for a valuable consideration, and without notice of such Covenant[f].

If one covenants, before Marriage, to settle certain Lands on his Wife for life, and afterwards, devises such Lands for the payment of debts, the covenant operates as a specific lien on the Lands. But a covenant to settle Lands of the value of £60 a year, without mentioning any particular Lands, does not operate as a specific lien, but the wife must come in as a Creditor in general, and the Master will value her Estate for life, and she will be allowed to the amount of that valuation[g]

Where a Husband covenants that Lands settled, are of such an annual value, this amounts to a covenant on his part to settle and make good to that extent, in case of deficiency; but the value must be calculated at the time of the Settlement, and not to the death of the Husband[h].

[e] Wade v. Paget, 1 Bro. C. C. 368; and see Vernon v. Vernon, 2 P. Wms. 594.

[f] Finch v. Earl of Winchelsea, 1 P. Wms. 282. Freemoult v. Dedire, 1 P. Wms. 429. Coventry v. Coventry, Gilb. Rep. 160. and at end of Francis' Max. cit. 1 Fonbl. Eq. 359. n. (d).

[g] Freemoult v. Dedire, 1 P. Wms. 429.

[h] Speake v. Speake, 1 Vern. 217.

If a Husband covenants to settle on the eldest Son of the Marriage, and lets Lands descend to him in fee, this is, so far, a performance of his covenant[i]. It is the same, where Lands descend to an Heir at Law, who claims in place of his ancestor, a sum of Money to be laid out in Land [k].

All these cases of implied satisfaction, or presumed performance, are where the Husband or Father has done nothing, as in the suffering Land to descend, without any declaration what way he intended they should go. But where a Will is made, and a clear intention discernible, the construction must be according to the Will[l].

So, where parties enter into an Agreement as to the produce of Land, the Land itself will be affected by the Agreement. Where, therefore, there was a covenant to appropriate one third of the produce of a real Estate to raise a sum of Money, it was considered not merely as a personal covenant suable at Law, but as creating a lien upon the Land, and the covenantees entitled to have it specifically performed [m].

If a sum of Money, say £500, be covenanted to be laid out in Freehold and Leasehold Property, and the Covenantor dies, it might be a question, no where, it seems, decided, between the Heir and Personal Representative, *how much* of the

[i] See dict. 2 Ves. 411.
[k] Ib.
[l] See Prime v. Stebbing, 2 Ves. 411.
[m] Legard v. Hodges, 3 Bro. C. C. 531. and S. C. on rehearing, 4 Bro. C. C. 421.

money is to be considered as Freehold Property descendible to the Heir, and how much as Leasehold, belonging to the personal Representative; but if in such case the Covenantor by his Will makes a general devise of all his Freehold and Leasehold Lands and Hereditaments, this would pass the £500 [n].

It is observable that where money is agreed or directed to be laid out in Land, to be settled to particular uses, it will, whilst uninvested, be considered as Land in regard to succession, and accordingly go to the *Heir* of the person intitled to the Inheritance in the Land to be purchased, in the same manner as the Land, if purchased, would have done [o]; until some person competent to dispose of the Lands under the limitation of the uses, shall clearly manifest and decide his intention to terminate the realizing Trust, and to dispose of, or have the uninvested fund again considered as mere personal Property [p].

And where a sum of money is given by Will, and directed to be laid out in the purchase of Lands, or of Lands in a particular county, and after they are bought to be settled upon such and such Persons; if a Bill is filed, the course of the Court is, to direct a purchase, and the produce of the money to go, as the Land itself, till

[n] See Guidot v. Guidot, 3 Atk. 254.

[o] See Attorney General and Milner, 3 Atk. 114.

[p] Pulteney v. Darlington, 7 Bro. P. C. 548. Toml. Ed.; and see Earlom v. Saunders, Ambl. 242. Bradish v. Gee, Ambl. 229.

purchased [q]. So, if there be a direction by Will to purchase a particular Estate, which is swallowed up by an Inundation, as happened in Essex: or if the direction is to purchase an Estate in such a county, and it cannot be procured, the money will not go to the Executors, but in such manner as the Rents and Profits would do, where the Land is purchased [r].

And where money is agreed by articles to be laid out in Land, the Party who would have the sole Interest in the Land when bought, may elect to have the money paid to him, and that it shall not be laid out in Land [s]. And it is the same in case of a *bequest* of money to be laid out [t].

A wife is examined apart from her Husband as to the disposition of money devised to be laid out in Land for her and her Heirs [v], or for her in Tail, Reversion to her in fee, whether she would receive the money, or have it laid out in Land. If she elects to take it in money, an enquiry is directed, whether she has a Settlement [w].

And where money is to be laid out in Land, to be settled on one for Life, with Remainder in Tail, the Court will pay out the Money upon the application of the Tenant for Life and the Te-

[q] Earl of Coventry v. Coventry, 2 Atk. 396. S. C. best reported at the end of Francis's Maxims in Eq.

[r] 2 Atk. 369. and see 10 Ves. 610.

[s] Benson v. Benson, 1 P. Wms. 130.

[t] Seeley v. Jago, 1 P. Wms. 389.

[v] Pearson v. Brereton, 3 Atk. 71.

[w] Binford v. Bowden, 1 Ves. Jun. 512; and see Oldham v. Hughes, 2 Atk. 453. Trafford v. Boehm, 3 Atk. 447. Cunningham v. Moody, 1 Ves. 176.

nant in Tail [x], provided they are not Infants [y]; but the Wife of the Tenant in Tail, as she would be entitled to Dower out of the Land, if the Money were laid out, must give her consent [z]. If, however, the Estate to be purchased was to be settled on *A.* for Life, Remainder to *B.* in Tail, Remainder to *C.* in fee, the Money was not directed to be paid on an application by *A.* and *B.* because of the contingency to *C.* but if the remainder was to *B.* in fee, or to *A.* in Tail, remainder to him in fee, then on such application, the Money was paid [a], as it was also, where those in Remainder consented [b].

The old rule was, to decree the Money to one who would be Tenant in Tail, if laid out in Lands, with remainders over; but *Lord Cowper* altered that doctrine [c], and held that the Remainder-man should have his chance, as he could not be barred but by Recovery, which required time, and would not direct it to be paid in Money; and the accident of the death of the Tenant in Tail in that case, before a Recovery shewed the Remainder-man's interest in so glaring a light, that it established the precedent [d]. But where the remainder can be barred by *Fine*, the Court will decree the Money [e].

[x] Amler v. Amler, 3 Ves. 587.

[y] Carr against Ellison, 2 Bro. C. C. 56. 1 P. Wms. 90, 130. and 389; and see Forester, 272.

[z] See note G. to Eyre's case, 3 P. Wms. 14,

[a] Short v. Wood, 1 P. Wms. 470. Trafford v. Boehm, 3 Atk. 447.

[b] Collet v. Collet, 1 Atk. 12.

[c] See Colwall v. Shadwell, 1 P. Wms. 471, 485.

[d] 1 Ves. 176.

[e] Ib.

And now, by the Statute (39 and 40 Geo. 3. c. 56.) it is not necessary to have such Money actually invested in Land, in order to bar the Estate Tail and Remainders over; but upon the Petition of the Tenant of the first Estate Tail, and of the owner of the antecedent particular Estate, if any [f], in the Lands, Courts of Equity may order the Monies subject to such Trusts to be paid to the Petitioners. But if it be a doubtful question what Estate the Party is entitled to, the Court will not decide it upon an *exparte* Petition under this Act [g].

And before an order can be obtained under the Act, the Court takes care to see, by a Reference to the Master for that purpose [h], that the *Fund is clear;* and a Petition will not be heard on the last day of Term; but to obtain the order in Term, the application must be made at such a period of the Term, as to give sufficient time for a Recovery to be suffered [i]. If the application is made in the vacation, the Money is ordered to be paid to the Party in case he should be living on the second day of the ensuing Term [k].

Having considered those cases in which a specific performance is decreed, we may now proceed to notice those instances in which *a Specific Performance has been refused.*

[f] In such case there must be two petitions, Baynes v. Baynes, 9 Ves. 462.

[g] Ex parte Sterne, 6 Ves. 156.

[h] Ex parte Hodges, 6 Ves. 576.

[i] Ex parte Frith, 8 Ves. 609.

[k] Ex parte Bennet, Ex parte Dolman, 6 Ves. 116. and Vid. note to Fletcher v. Tollet, 5 Ves. 12. in note.

The Court will not decree a specific performance of contracts of every description. It is only where the party wants the thing *in specie*[l], and where the legal remedy is *inadequate* or *defective*, that a Court of Equity interferes[m].

It is on this ground that, generally speaking, (as before adverted to) a Bill will not lie for the specific performance of an Agreement respecting *chattels*; and on the same principle a Court of Equity has refused to decree a specific performance of a covenant to *make good a gravel pit*, for complete Justice could be done at Law in an action for breach of the contract[n].

It has been said (though there are early *dicta* to the contrary[o],) that a specific performance of an Agreement *to build* an House will not be decreed[p]; but *Lord Hardwicke* seems to have thought differently[q], and decreed a specific performance of a covenant to *rebuild*, though he would not of a covenant *to repair*[r]; and it seems that if on a covenant to build, the transaction is in its nature defined, a specific performance would be decreed; but if it is loose and undefined, and it is not expressed distinctly what the building is, so that the Court could describe it as a subject for the

[l] Errington v. Aynesley, 2 Bro. C. C. 341.

[m] Flint v. Brandon, 8 Ves. 163.

[n] Ib. 159. Scholefield v. Whitehead, 2 Vern. 127.

[o] See ante, p. 287.

[p] See Lucas against Commerford, 3 Bro. C. C. 167. S. C. 1 Ves. Jun. 236. Errington against Aynesley, 2 Bro. C. C. 343. Flint v. Brandon, 8 Ves. 164. contra, Holt v. Holt, 2 Vern. 322. and dict. 1 Ves. 461.

[q] 3 Atk. 515.

[r] City of London v. Nash, 1 Ves. 12. S. C. 3 Atk. 512. see Mosely v. Virgin, 3 Ves. 185; Hill and Barclay, 16 Ves. 184. as to covenant to repair; and see Whisler and Mainwain, mentioned 3 Wood. 434. in note.

Report of the Master, the Jurisdiction does not apply [s].

A Bill will not lie for a specific performance of an Agreement to refer to Arbitration [t].

If an Estate be sold under a Decree, a Bill for a specific performance will not lie, but the Purchaser must proceed under the Decree [v].

A Party calling for the aid of a Court of Equity, must come, as it is said, with clean hands [w]. A Defendant, therefore, to a Bill for a specific performance of an Agreement, is allowed to resist it, by shewing, that under the circumstances, the Plaintiff is not entitled to the prayer of his Bill, as by evincing, there has been an *Omission* or *Mistake*, in the Agreement [x], or that it is *unconscientious* [y]; or *Fraud*, or *Surprize* [z], or that there has been *Concealment* [a], *Misrepresentation* [b], or other *unfairness* [c], (intoxication, for instance [d],) attending it: and in these cases parol Evidence of such circumstances is permitted; for though parol Evidence is inadmissible on the part of a Plaintiff,

[s] Mosely v. Virgin, 3 Ves. 185.

[t] Street v. Rigby, 6 Ves. 818.

[v] Annesley v. Ashurst, 3 P. Wms. 282.

[w] Cadman v. Horner, 18 Ves. 11.

[x] Joynes v. Statham, 3 Atk. 388. Woolam v. Hearn, 7 Ves. 211. see 1 Ves. and Bea. 532. Mason v. Armitage, 13 Ves. 25.

[y] Vaughan against Thomas, 1 Bro. C. C. 556.

[z] Clowes v. Higginson, 1 Ves. 526, 7. Marquis Townshend v. Stangroom, 6 Ves. 328. Twining v. Morrice, 2 Bro. C. C. 326. alluded to in Mortlocke v. Buller, 10 Ves. 305.

[a] Shirley v. Stratton, 1 Bro. C. C. 440. Olfield v. Round, 5 Ves. 508.

[b] Cadman v. Horner, 18 Ves. 11. Buxton v. Lister, 3 Atk. 386. Phillips v. Duke of Bucks, 1 Vern. 227. Howard v. Hopkins, 2 Atk. 370.

[c] Savage v. Taylor, For. 234; and see Child v. Dawbridge, 2 Vern. 71. Scott v. Murray, 1 Ves. 2.

[d] Cragg v. Holme, mentioned in note to Cooke v. Crayworth, 18 Ves. 14. and approved (ib.) p. 15. but see ante, p. 238. etc.

to explain, add to, or vary a written Contract[e], (except in cases of Fraud[f],) it is admissible on the part of a Defendant to a Bill for a specific performance, to shew circumstances, *dehors*, independant of the Writing, making it inequitable to interpose for the purpose of a specific performance.

Where, therefore, on the face of the Agreement a specific sum was to be given for timber, but it was shewn by parol Evidence that the Defendants were induced to give that sum, upon an untrue Representation, that it was valued by two Timber Merchants, it was not enforced[g]. So, where an Agreement was to pay so much Rent, but by the Evidence it appeared the Defendant was induced so to agree, because she thought from the Plaintiff's false representation, it was the rent he paid, a specific performance was refused[h].

So, in a case, where the Defendant proved that, at the time the Agreement was executed, there was a parol Agreement by the Plaintiff, upon the faith of which, the Defendant executed, which parol Agreement had been unperformed, a specific performance in favour of the Plaintiff was refused[i].

Where an Agreement has been unfairly ob-

[e] Ramsbottom v. Gosden, 1 Ves. and Bea. 165; and see what is said in Butler v. Cooke, 1 Sch. and Lefr. 59; and see Meeres v. Ansell, 3 Wils. 275. Penn v. Lord Baltimore, 1 Ves. 451. Baker v. Payne, 1 Ves. 456. Woolam v. Hearn, 7 Ves. 211, 219. Robson v. Collins, 7 Ves. 130; and see Marquis Townshend v. Stangroom, 6 Ves. 328. Rich and Jackson, 4 Bro. C. C. 514. Judgment more fully given, 6 Ves. 336. Coles v. Trecothick, 9 Ves. 246. Winch v. Winchester, 1 Ves. and Bea. 375. Clowes and Higginson, 1 Ves. and Bea. 526, 7.

[f] Baker v. Paine, 1 Ves. 456. Pember v. Matthews, 1 Bro, C. C. 52.

[g] Buxter v. Lister, 3 Atk. 383.

[h] Woollam v. Hearn, 7 Ves. 219.

[i] Clark v. Grant, 14 Ves. 519.

tained, and the Party has been in possession, and made lasting Improvements, he has been allowed for them, on consenting to deliver up the agreement and account for the Profits, but not if he goes to Law, and fails there [k].

In the case of articles, if they appear unreasonable, or if even *some parts* of them appear unreasonable [l], or founded on a fraud, or it would be unjust or unconscionable to give assistance, a Court of Equity will not enforce them [m]. So, if an Heir sells a Reversion in the life of his Father at an under value, the Court will not, in favor of such a Purchaser, decree a specific performance of a covenant for further assurance [n].

An Agreement may be resisted on the ground of a *parol waiver* [o]; but the proof must be very clear [p]. If variations in an Agreement, by Parol, be so acted upon, that the original Agreement cannot be enforced, without injury to one party, that circumstance would be a bar to a specific performance of such original Agreement [q]; but variations, verbally agreed upon, are not sufficient to prevent the execution of a written Agreement, if the situation of the Parties, in all other respects, remains unaltered [r].

[k] Savage v. Taylor, For. 234.

[l] See 3 Atk. 190.

[m] Young v. Clerk, Preced. Ch. 538.

[n] Johnson v. Nott, 1 Vern. 271.

[o] Goman v. Salisbury, 1 Vern. 240. Price v. Dyer, 17 Ves. 356. Legal and Miller, 2 Ves. 299; and see this case cited by the Chancellor, 6 Ves. 336. in note. Gibbons v. Caunt, 4 Ves. 848. Sed vide Woollam and Hearne, 7 Ves. 211.

[p] Buckhouse and Crosby, 2 Eq. Abr. 33.

[q] See the case in 2 Eq. Abr. 48. pl. 16. and in Vin. Abr. Tit. Contract and Agreement, (H.) Ca. 38. and Legal and Miller, 2 Ves. 299.

[r] See Price and Dyer, 17 Ves. 364.

An Agreement, if impeached, must be so, *at the time of its commencement*, nothing *subsequent* can impeach it[s]: a failure in a speculation forms no ground to resist a specific performance[t]. There are, however, cases, where, when a specific performance would be attended with great loss and hardship to the Defendant, the Court has not directed a specific performance, but has directed an Issue to try what damages the Party has sustained by the nonperformance of the Agreement[u]. In *Family arrangements*, particularly, the Court has held Parties to Agreements which strangers would not have been bound by[v]; but, in general, the Court will not hold parties acting upon their rights, doubts arising as to those rights, to be bound, unless they act with full knowledge of all the doubts and difficulties that arise: but if Parties with full knowledge act upon them, though it turns out that one gains a great advantage, if the Agreement was fair and reasonable at the time, it will be binding[w]. It has been held that the Court will enforce such an Agreement, though it turns out that the Parties acting upon a wrong opinion of Counsel, were mistaken in point of Law[x].

[s] 1 Atk. 404.

[t] Adams against Weare, 1 Bro. C. C. 569; and see Mortimer v. Capper, 1 Bro. C. C. 156.

[u] City of London v. Nash, 3 Atk. 516.

[v] Stockley v. Stockley, 18 Ves. 31. Stapilton v. Stapilton, 1 Atk. 1.

[w] Stapilton v. Stapilton, 1 Atk. 10. Can v. Can, 1 P. Wms. 727. but see Davy v. Barker, 2 Atk. 491. where it is said, that where any extraordinary advantage happens by an accident, it is in the discretion of the court to decree a specific performance.

[x] Gibbons v. Caunt, 4 Ves. 849.

No Agreement will be enforced that is *illegal*; as, for instance, it be founded in *champerty*[y], or the Agreement be to stifle a prosecution for Felony[z]; no claims being allowed which cannot be supported, except through the medium of an *illegal Agreement*[a]. Nor does the Court ever do so fruitless a thing, as to decree a specific performance of *acts, impossible to be done.* In such case it leaves the party to his remedy at Law[b].

A *Voluntary Conveyance* is good against the Party making it, though cancelled[c], and against all subsequent voluntary conveyances, whether by Deed[d], or Will[e], though the devise be for the payment of debts[f]; for the Court, as it hath been said, "will not loose the fetters the Party hath put upon himself, but he must lie down under his own Folly[g]." As against Purchasers for a valuable consideration, and Creditors, it is (as hath been shewn[h],) bad; and if a voluntary Settlement is made, and afterwards a Sale is made to a Purchaser, who even has notice of the voluntary conveyance, there is no Equity to apply to the Court to lay out the purchase Money to the same uses, as the voluntary conveyance; not even, though there was an express covenant to

[y] Powell v. Knowler, 2 Atk. 224.

[z] Johnson v. Ogilby, 3 P. Wms. 279.

[a] Thomson v. Thomson, 7 Ves. 473.

[b] Green v. Smith, 1 Atk. 573.

[c] Villers v. Beaumont, 1 Vern. 100. Clavering and Hill, 1 Eq. Abr. 475. S. C. Prec. Ch. 473. and 2 Vern. 473.

[d] 1 Ch. Rep. 173.

[e] See case determined by Lord Somers, mentioned in Lady Hudson's case, Prec. Ch. 235.

[f] Bale v. Newton, 1 Vern. 464.

[g] 1 Vern. 101.

[h] See ante p. 216. etc.

lay out the Money to the same uses [i]. Nor where a voluntary Conveyance has been made, will the Court injoin the Party from selling [k].

But a Settlement voluntary at first may become good afterwards: as where a Father settles Lands on a Daughter, and the Husband marries her, in confidence of such Settlement, it may be enforced [l].

With regard to a specific performance of a *voluntary Agreement*, there are, as *Lord King* observes [m], Precedents both ways. There are cases in which it has been held that an Agreement under hand and seal, though voluntary, *ought* to be specifically decreed [n]; and on the other hand, it has been solemnly determined that a voluntary conveyance *cannot* be enforced [o], the Court never decreeing specifically without a consideration [p]. The later cases appear to have taken a middle course, and to establish that a Court of Equity will not interfere *against* volunteers [q], unless in cases of Fraud [r]. So, it will not interfere *for* volunteers [s];

[i] Pulvertoft v. Pulvertoft, 18 Ves. 93; and see Buckle v. Mitchell, 18 Ves. 112. contra Leach v. Dean, 1 Ch. Rep. 78.

[k] Pulvertoft v. Pulvertoft, 18 Ves. 84.

[l] East India Company and Clavell, Prec. Ch. 379, 380. S. C. Gilb. Rep. 37.

[m] Randall v. Randall, Prec. Ch. 464.

[n] Beard v. Nutthall, 1 Vern. 427. Husband and Pollard, mentioned 2 P. Wms. 467. Wiseman v. Roper, 1 Ch. Ca. 84. Frank v. Frank, ib; and see Edwards v. Countess Warwick, 2 P. Wms. 176. Wentworth v. Deverginy, Prec. Ch. 69.

[o] Fursacre v. Robinson, Prec. in Ch. 475; and see Peacock v. Monk, 1 Ves. 133. and what is said in Underwood v. Hitchcox, 1 Ves. 280.

[p] Penn v. Lord Baltimore, 1 Ves. 450. and see what is said in Williamson v. Codrington, 1 Ves. 514.

[q] Coventry v. Coventry, at end of Francis's Maxims in Eq.

[r] See Morrice and Burroughs, 1 Atk. 401.

[s] Graham v. Graham, 1 Ves. Jun. 275.

it will not enforce the specific performance of a voluntary Agreement[s], unless, indeed, in those cases where a specific performance of *marriage Articles*, has been decreed, even as to *Collaterals*[t].

Wherever a voluntary Deed is not sufficient to pass the subject out of the Conveyer, it will never be specifically enforced, unless it is supported by a *valuable*, or at least what Equity calls a *meritorious* consideration; such as the *payment of debts*, or making a *Provision for a Wife or Child*[v]. Where the Legal Conveyance is effectually made, as Stock, for instance, transferred[w], or Lands conveyed[x] to a Trustee, the Court will execute the Agreement, as against the *Trustee*, and the *Author of the Trust*[y]; unless where the Party has a right to put an end to it by his own act, under a sole power of Revocation[z].

Those cases in which a voluntary conveyance kept in the possession of the Party during his Life, and in his possession at the time of his death, has been held to operate against his Will, has been where there was *a compleat conveyance*,

[s] Stapilton v. Stapilton, 1 Atk. 10; and see 3 Atk. 399, 18 Ves. 149.

[t] Goring v. Nash, 3 Atk. 189. see Osgood and Strode, 2 P. Wms. 245. Edwards v. Countess Warwick, 2 P. Wms. 175. Pulvertoft v. Pulvertoft, 18 Ves. 90, 92; and see what is said in Stephens and Trueman, 1 Ves. 74. and Ithell v. Beane, ib. p. 216.

[v] Colman v. Sarel, 3 Bro. C. C. 14. S. C. 1 Ves. Jun. 50. Ellison v. Ellison, 6 Ves. 662; and see Griffin v. Nanson, 4 Ves. 356. Pulvertoft v. Pulvertoft, 18 Ves. 99. Lechmere v. Lord Carlisle, 3 P. Wms. 222.

[w] Ellison v. Ellison, 6 Ves. 662; and see Pulvertoft v. Pulvertoft, 18 Ves. 99, 100. Ex parte Pye, 18 Ves. 149.

[x] Smith v. French, 2 Atk. 243.

[y] Antrobus v. Smith, 12 Ves. 46.

[z] Pulvertoft v. Pulvertoft, 18 Ves. 99.

a transfer in Law, of the Property: nothing requisite to add to the validity of it; the instrument permitted to remain uncancelled; and all the Court was called upon to say was, that a Will, a mere voluntary Act, as much as the Deed, should not be a revocation of the Deed.

A Covenant by a Husband to reconvey an Estate, settled on him by *Mistake*, is not considered as voluntary, but may be enforced [a].

The Court will not enforce the performance of a *voluntary Agreement* for a Lease, the mere result of Bounty; but the Court would not disturb a Lease actually made in pursuance of such an Agreement [b].

Neither will an agreement be decreed, where the performance of it would be *a breach of Trust* [a], or produce a *Forfeiture* [b].

A specific performance of an agreement for a Partnership, has been refused, as it might be dissolved immediately afterwards [c].

If there has been gross laches, in a Plaintiff, a specific performance of an agreement for the purchase of an Estate, will not be decreed.

The doctrine, in regard to Contracts stipulated to be performed within a given period, that time is not essential, has been quarrelled with [d]; for,

[a] Randall v. Randall, 2 P. Wms. 464. see Anon. Prec. Ch. 101.

[b] Willan v. Willan, 16 Ves. 82.

[a] Mortlocke v. Buller, 10 Ves. 292. S. C. MSS.

[b] Brian v. Acton, 5 Vin. Abr. 533. pl. 33.

[c] Hercey v. Birch, 9 Ves. 357. S. C. MSS. but see contra Buxton v. Lister, 3 Atk. 385. and Anon. 2 Ves. 629.

[d] This doctrine seems in some degree to have arisen out of a misreport of Gibson v. Patterson, 1 Atk. p. 12. See 4 Ves. 689, 690. See Radcliffe v. Warrington, 12 Ves. 326. 1 Ball and Beatty 68.

though time is not so strictly regarded in Equity, as at Law, yet, it seems, generally speaking, that it is essential[e], though there may be cases, where it not being material, or of the essence of the contract[f], and cases arising out of the Conduct of the Parties[g], inevitable Accident, &c. which may induce the Court to relieve, for the Court has a discretion on the subject.

Where a contract had long lain dormant, thirteen years[h], for instance, a specific performance has been refused[i]; and laches, of much less continuance, is sufficient to dissolve the contract; for where no step had been taken from the day of the sale, and six months had elapsed after the expiration of the time, at which the contract was to be completed, the conduct of the Vendor was considered as evidence of an abandonment of the Contract[k]. So, where nothing had been done towards performance of the Agreement, when the Purchaser became a Bankrupt, nor afterwards, until the Premises, by a subsequent event proved to be much more valuable than they were at the time the Contract took place, a specific performance was refused[l].

[e] Keen and Stuckley, Gilb. Eq. Cas. 155. Lechmere and Lewis, Lucas 503. Lloyd and Collet, 4 Bro. C. C. 469. and the judgment in that case in 4 Ves. jun. 689, 690. in note to Harrington and Wheeler, 4 Ves. 686. Spurrier and Hancock, 4 Ves. 674. Guest and Homfray, 5 Ves. 818.

[f] See Hearne v. Tenant, 13 Ves. 289. and Radcliffe v. Warrington, 12 Ves, 325.

[g] See Seton v. Slade, 7 Ves. 265.

[h] Clifton v. Taylor, MS.

[i] Wingfield v. Whaley, Vin. Abr. tit. Contract and Agreement, (L) Ca.36; and see Moore v. Blake, 1 Ball and Beatty 62.

[k] Lloyd against Collett, 4 Bro. C. C. 469. S. C. stated in note to 1 Atk. 12.

[l] Alley v. Deschamps, 13 Ves, 225.

It was held upwards of a century ago, that where one Party has trifled or shewn a backwardness in performing his part of the Agreement, a specific performance would not be decreed in his favour, especially if circumstances were altered[m]; but afterwards, it became a prevailing idea, that where an Agreement was entered into, either party might, *at any time*, obtain a specific performance[n]. *Lord Kenyon* is said to have been the first who resisted that notion, and *Lord Rosslyn* followed his example[o], and held, that a Party cannot call upon a Court of Equity for a specific performance, unless he has shewn himself ready, desirous, prompt, and eager[p]. If, in particular, there be an Agreement for the sale of a *reversion*, and part of the terms is, that the purchase Money be paid by a certain time, if it is not so paid, by default of the Vendee, the Vendor is discharged from his Contract[q]; for no man sells a Reversion who is not distressed for Money, and it is ridiculous to talk of making him a compensation, by giving him Interest on the Purchase Money during the delay[r].

If the Vendee, on a *Sale by Auction*, calls for his deposit at the end of the time limited for compleating the purchase, and insists he will not go on with the purchase, the Court will not compel

[m] Grounds and Rudiments of Law and Equity, p. 18.

[n] See 1 Atk. 12; and what is said in Jones and Price, 3 Anstr. 924.

[o] See Marquis of Hertford v. Bone, 5 Ves. 720; and see Guest v. Homphray, 5 Ves. 818.

[p] See Milward v. Earl Thanet, 5 Ves. 720. in note.

[q] Newman against Rogers, 4 Bro. C. C. 391.

[r] Ib. 393.

him; but if the Vendee acquiesces in the delay, or does not sufficiently declare his dissent, a specific performance will be decreed[s].

If a Plaintiff has failed to perform his part of an Agreement, or if it has become impossible to perform it, he cannot insist on a specific performance[t]; but if he has performed so much of his part of the Agreement, that he cannot be put in *statu quo*, and is in no default for not performing the residue[u], or is prevented from compleating it, by the default of the defendant[v], he is intitled to a specific performance.

There is, however, a difference between *Agreements on Marriage* being carried into Execution and other Agreements: for all other Agreements are considered as entire, and if either of the parties fail in performance of the Agreement, it cannot, at the instance of such Party, be decreed in specie, but must be left to an action at law; but in *Marriage Agreements* it is otherwise, for though either the relations of the Husband or Wife should fail in the performance of their part, yet the Children may compel a performance. If the Mother's Father, for instance, hath agreed to give a Portion, and the Husband's Father hath agreed to make a Settlement, though the Mother's Father do not give the Portion, yet the Children may compel a Settlement;

[s] Pincke against Curteis, 4 Bro. C. C. 329. Jones and Price, 3 Anstr. 924.

[t] Feversham v. Watson, Ch. Cas. 26. S. C. Finch 445. and Gilb. Lex Prætoria, MS.

[u] Meredith and Wynn, 2 Ch. Cas. 18, 19. S. C. Pre. Ch. 312. Gilb. Rep. 70. Lex Prætoria 240, 241.

[v] Blackwell v. Nash, 1 Str. 535.

for non-performance on one part will be no impediment to the Children's receiving the full benefit of the Settlement: so, if there be failure on the part of the Father's relations it is the same; all the Court could do in that case would be to lay hold on such Estate, as he should claim, towards making good his portion of the Settlement; for the Children are considered as Purchasers, and entitled to all the benefit of the Uses under the Settlement, notwithstanding there has been a failure on one side [w].

If a Man after entering into a Contract for a Lease commits a *Felony*, the Court will not enforce the Contract [x].

So, if the Tenant has treated the Land in an unhusbandlike manner, and has been guilty of various breaches of covenant, for which the Lessor had a right of re-entry, the Court will not decree a specific performance in his Favor [y].

Lord Rosslyn appears to have thought, a Wife who had eloped or committed adultery, could not enforce a specific performance of articles for a Jointure [z]; and *Lord Manners* was of the same opinion, but considered himself as bound by Authority, and decided [a], as other Judges had

[w] Hervey v. Ashley, 3 Atk. 610. Perkins against Thornton, Ambl. 502. and see Pyke v. Pyke, 1 Ves. 377; and what is said in Hilton v. Biscoe, 2 Ves. 309.

[x] So said in Willingham v. Joyce, 3 Ves. 168.

[y] Hill v. Barclay, 18 Ves. 63.

[z] See what is said in Buchanan v. Buchanan, 1 Ball and Beatty 206.

[a] Ib. 203.

previously done[b], that such articles might, under such circumstances, be enforced.

If the Plaintiff has taken all proper steps towards the performance of his part of the Agreement, but has been prevented compleating it by the neglect of the Defendant, his endeavours will, both at Law and in Equity, be considered as equivalent to performance[c].

Insolvency admitted, and not cleared away, is a weighty objection to a specific performance of an Agreement for a Lease[d].

It has never been determined that the Assignee of a Bankrupt can compel a Landlord specifically to perform an Agreement to grant a Lease to the Bankrupt[e]. *Lord Rosslyn* would not say it was impossible, and would not allow a *Demurrer* to a Bill for that purpose[f]; but *Sir William Grant* considered the difficulty as insurmountable[g], and there is a Decision[h], and strong *Dicta* in conformity with his opinion[i]. A Bankrupt Vendee cannot enforce a specific performance[k].

If an act of Bankruptcy has been committed

[b] See Sidney v. Sidney, 3 P. Wms. 269. Winter v. Blount, 3 P. Wms. 276. in note: Seagrave v. Seagrave, 13 Ves. 439.

[c] 1 Fonbl. Tr. Eq. who quotes Roll's Abr. 455, 457, 458. Litt. s. 335. Blackwell and Nash, 1 Str. 533. Hotham and East India Company, 1 T. R. 638.

[d] Buckland and Hall, 8 Ves. 95; and see O'Herliky v. Hedges, 1 Sch. and Lefr. 130.

[e] See Weatherall v. Geering, 12 Ves. 513.

[f] Brooke v. Hewitt, 3 Ves. 253.

[g] Weatherall v. Geering, 12 Ves. 514.

[h] See Moyses v. Little, 2 Vern. 194.

[i] See Willingham v. Joyce, 3 Ves. 168. Buckland v. Hall, 8 Ves. 75.

[k] Franklin v. Lord Brownlow, 14 Ves. 550.

by the Vendor, though not followed by a Commission, he cannot compel a specific perfomance [l].

A specific performance of an Agreement is sometimes refused, on grounds of *public policy*. As where the Agreement originated in communications to the Defendant, by the Commissioners who took the Depositions in a cause, and by the Witnesses, as to the nature and effect of the Evidence [m].

On the same ground the Court has refused to enforce an Agreement by an Officer in the Army, for an Assignment of his half pay [n]; or an Agreement by a *Gaoler* to assign his Fees [o].

An Agreement must be *mutual*, in order to be enforceable.

Where therefore it appears that nothing has been done under an Agreement [p], the Court will not, (except, perhaps, in the case of an *Infant* [q],) decree a specific Performance, unless the right to compel, *is mutual*.

The case of *Hatton and Gray* [r], is often cited to shew that it is sufficient that the Agreement should be signed by the Party against whom the performance is sought, and so seem the current of the case [s]; but, says *Lord Redesdale*, in his ob-

[l] Lowe v. Lush, 14 Ves. 547.
[m] Cooth v. Jackson, 6 Ves. 12.
[n] Stone v. Lidderdale, 2 Anstr. 533.
[o] Mithwold v. Walbank, 2 Ves. 238.
[p] Hawkins v. Holmes, 1 P. Wms. 770.
[q] See dict. in Shannon v. Bradstreet, 1 Sch. and Lefr. p. 58.
[r] 2 Ch. Cas. 164. S. C. 1 Eq. Abr. 21.

servations on that case, "to give the Statute such a construction would make it really a Statute *of Frauds*, for it would enable any person who had procured another to sign an Agreement to make it depend on his own will and pleasure, whether it should be an Agreement or not[t]."

In the case of *Hatton* v. *Gray*, so much relied on as the leading case on the subject, the ground of the decree for a specific performance appears, (not indeed in the short note in Eq. Cas. Abr. but in the Report in Chancery Cases[v],) to have been, that the Plaintiff drew up the Agreement in his own hand, and that procuring B. to sign it, on his part, the signing of B. was not only a signing for himself, but as authorised by the Plaintiff to close the Agreement[w], and therefore if B. had come into a Court of Equity against A. the Court would have decreed the Agreement against A.[x] The reasoning of the Case is rather strained, but the case shews, the Agreement must be mutual; and therefore, with all due deference, it was not, as *Lord Redesdale* and others[y] seem to suppose, a case where the Agreement was not considered as mutual, but the contrary. It is, therefore, when justly considered, an authority in favor of his Lordship's interpretation of the Statute.

If the Agreement be signed only by the Party

[t] Lawrence v. Butler, 1 Sch. and Lefr. 20.

[v] 2 Ch. Cas. 164; and Lex Prætoria, MS.

[w] Sed. vid. Wright v. Dannah, 2 Campb. 203.

[x] Lex Prætoria, MS.

[y] Newland on Contracts, 171. 155. Roberts on Frauds, p. 124. Sugden's Law of Vend. and Purch. 64. last Edit.

who seeks a specific performance, it is very clear it will not be decreed [z].

The effect of *Inadequacy of Price* upon contracts has been already considered under the head of Fraud, and it is not necessary, in this place, to say more than that where a Sale has been for a very low price [a], or extremely unreasonable [b], the Court will not enforce a *specific performance;* but where by some occurrence, subsequent to the Agreement, it becomes a beneficial bargain, or turns out to be a losing concern, the same will be decreed [c]; accidental subsequent advantage forming no objection to a specific performance [d]. Where, however, there has been such an alteration of the Property that it cannot be enjoyed according to the stipulations of the Agreement, a specific performance has been refused [e].

If there is *a want of certainty* in the terms of the Agreement, it will not be decreed; as where a Tenant in Tail, with power to make a Jointure, arti-

[z] Hall v. Butler, 1 Eq. Abr. 20. Hawkins v. Holmes, 1 P. Wms. 770. Contra. Lowther v. Carril, 1 Vern. 221.

[a] Collet against Woolaston, 3 Bro. C. C. 208. see also Day v. Newman, mentioned in Newland on Contracts, p. 66. S. C. 10 Ves. 300.

[b] Barnardiston v. Lingwood, Barn. 341. see 1 Eq. Abr. p. 17. in margin. See Anon. 2 Ch. Cas. 17. Hick v. Phillips, Prec. Ch. 575; and see Preston and Wasey, Prec. Ch. 76. S. C. 2 Eq. Abr. 55; and also the cases mentioned in margin. Tristam and Melhuish, Vin. Abr. Tit. Contract and Agreement, (P.) Ca. 10. Squire and Baker, ib. Ca. 12.

[c] City of London v. Richmond, 2 Vern. 423. S. C. Prec. Ch. 156; and see Cass v. Rudle, 2 Vern. 280. but see cases on a contrary principle, Ch. Ca. 19. Awbry and King, 2 Vern. 472.

[d] Anon. MS.

[e] City of London v. Mitford, 14 Ves. 41.

cled, in consideration of Marriage, to make a Jointure, without saying out of what Lands, or to what amount, and the Wife died, and her Executrix brought a Bill for an account of the Profits of the Lands articled to be settled, the Bill was dismissed[f]. So, where a Man in consideration of Marriage, promises by letter, to pay his Daughter a Fortune, without reducing it to any certainty, a Court of Equity cannot carry it into a specific Execution[g]. Many other cases have been decided on the same principle—the want of *certainty* in the Agreement[h].

But the Court will, if it can, execute an uncertain Agreement, by reducing it to a certainty[i]; and where a thing is to be done, but *no time* fixed, the Court has, in several cases, decreed a performance, in a *reasonable* time[k].

An Agreement to sell, at a *fair valuation*, may be enforced[l]; and if the Terms of an Agreement are to be ascertained by an Award, and are so ascertained, a Court of Equity will enforce the Agreement, if any thing is to be done *in specie;* as Estates to be conveyed, &c.[m]; but if there is not a valid Award, as agreed upon, the Court will not specifically perform the Agreement,

[f] Elliot v. Hele, 1 Vern. 406.

[g] Hall and Butler, Gilb. Rep. Lex Prætoria, MSS. 1 Eq. Abr. 20.

[h] See Bromley v. Jefferies, 2 Vern. 415. and Emery and Wase, 5 Ves. 849.

[i] See Allen and Harding, 2 Eq. Ca. Abr. 17. pl. 6.

[k] Southwell v. Abdey, Hil. 6 Geo. 2. 1732. MS. contra 2 Ch. Rep. 17.

[l] Emery v. Wase, 5 Ves. 846. Milnes v. Gery, 14 Ves. 407.

[m] As to this see Hall v. Hardy, 3 P. Wms. 189.

unless there has been *acquiescence;* or the Agreement, evidenced by the Award, has been *in part performed* [n]; but where the Award has not been partly performed, a specific performance has been refused [o].

The subject matter of an Agreement, in order to be enforced, must, as before observed, be clearly defined; but in Agreements between parties, many things not particularized, are understood as agreed upon.

If, for instance, a Man covenants to sell a Fee-simple Estate, free from incumbrances, and says no more, this covenant, alone, entitles the purchaser to proper covenants. It is well settled what are the proper covenants, where the Vendor was himself a Purchaser for a valuable consideration, or where he acquired the Property by descent, or by purchase, but not for a valuable consideration.

A Person agreeing to sell an Estate in *fee-simple* must covenant that he is seized, and has power to convey, in fee;—for quiet enjoyment;—that the Estate is free from Incumbrances;—and for further assurance: and if the Vendor purchased the Estate for a valuable consideration, and obtained proper covenants for the Title, he must deliver, or covenant to produce, his Title Deeds, and

[n] Blundell v. Brettargh, 17 Ves. 232. Cooth v. Jackson, 6 Ves. 34. Milnes v. Gery, 14 Ves. 400. overruling Hall and Warren, 9 Ves. 605. as to this point; and see Norton v. Mascall, 2 Vern. 24.

[o] Bishop and Webster, 1 Eq. Abr. 51. S. C. Precedents in Ch.

covenant against his own acts only. If the Vendor's Title is by Descent, Devise, or otherwise as a Purchaser, not for a valuable consideration, the Vendor must covenant, not only for himself, but against the acts of the last Purchaser; or at least, of the Person immediately preceding him [p].

And if there should have been an intermediate Heir supposed to be dead, it is reasonable the Covenants should extend to his Acts; but if the sale takes place under such circumstances, that it was not known whether there was an intermediate Heir, and the consideration Money is reduced in proportion to the doubt upon the Title in that respect, there is no need of a covenant against the Acts of such Heir [q].

Where an Estate is agreed to be sold for the payment of Debts, and no surplus remains, the Court will not require the Heir to covenant any farther than for his own Acts [r]; and the rule is the same in such case, as to a Devisee; but if a Sale be decreed, and after such sale a considerable surplus comes to the Heir at Law or Devisee, the Heir has been directed to covenant that neither he, nor the immediate ancestor under whom he claims; and in the case of a Devisee, that neither he nor his Devisor, have done any act to incumber [s].

[p] Vid. Church and Brown, 15 Ves. 263. in note by Mr. Vesey. Loyd v. Griffith, 3 Atk. 267. 2 Bos. and Pull. 22; and see Sugd. Vend. and Purch. 388, etc. and p. 457, etc. last Ed. see also 14 Ves. 239.

[q] Vid. Pickett and Loggon, 14 Ves. 239.

[r] Loyd v. Griffith, 3 Atk. 267.

[s] Ib. 268.

Where there is simply an Agreement for a Lease, for a certain number of years, and no more, this entitles a Party to the *usual* Covenants [t].

In an Agreement between Landlord and Tenant, the word *clear*, is construed, clear of all Outgoings, Incumbrances and extraordinary Charges, not according to the custom of the Country, as Tithes, Poor-rates, and Church-rates, which are natural charges on the Tenant [u].

It seems now fully established, though there are cases to the contrary [v], that an Agreement for a Lease, *with usual Covenants*, does not include a Covenant against alienation without licence [w].

If the Agreement were, to grant a farm Lease *with the usual and customary covenants of the neighbourhood*, what such usual and customary Covenants are, might be made the subject of inquiry before the Master [x].

He who takes the assignment of a Term, is bound to give a Covenant of Indemnity to the Assignor, against the payment of the Rents, and the performance of the covenants: and there is no distinction between the cases of an assignment

[t] Church v. Browne, 15 Ves. 258.

[u] Lord Tyrconnel v. Duke of Ancaster, Ambl. 240.

[v] Vere and Lovedon, 12 Ves. 179. Jones v. Jones, 12 Ves. 186. following Folkingham v. Croft, 3 Anstr. 700. Morgan v. Slaughter, 1 Esp. N. P. C. 8.

[w] Church v. Browne, 15 Ves. 258. and Browne v. Raban, 15 Ves. 528. following Henderson v. Hay, 3 Bro. C. C. 632.

[x] Boardman v. Mostyn, 6 Ves. 471.

by the original Lessee, and by an Assignee of that original Lessee [a].

Of all objections to a specific performance, *the want of a Title*, is that which is most frequently urged by a Defendant.

A Purchaser is not obliged to take an *Equitable* Title [b], unless where Estates are sold under a decree, before a Master [c]; but has a right to insist upon having a *clear Legal Title*, commencing at least sixty years anterior to the time of his purchase; and sometimes for a longer period, where there are remainders, after existing Estates Tail [d].

If objections are made to a Title, the Chancellor may be called upon to decide, whether a good Legal Title can be made; but as this is a pure question of Law, if the Chancellor has any doubt, he usually refers such doubts for the opinion of a Court of Law, the most authoritative forum on such points. The Equity Reports abound with decisions on objections made to Titles, but the consideration of such of them as relate merely to questions of Law, is not within the design of this Work. In treating of this subject, we shall therefore confine ourselves to such questions as can arise only in Courts of Equity.

If there be a difference in value between the real Interest of the Vendor, and the Interest

[a] Stains v. Morris, 18 Ves. 13.

[b] Cooper v. Denne, 4 Bro. C. C. 80. S. C. 1 Ves. Jun. 565.

[c] Sugd. Vend. and Purch. 271; and see Chandler and Beard, 1 Dick. 392. there quoted, and also Marlow and Smith, 2 P. Wms. 198. and Shaw v. Wright, 3 Ves. 22.

[d] Sugd. Vend. &c. p. 259, &c.

represented as proposed for Sale, (though innocently misrepresented[e],) the Purchaser is, it seems, entitled if he chooses to abide by the Purchaser, to have such difference deducted from his Purchase Money[f], by way of *compensation*[g]; nor can the Vendor, it seems, refuse[h]: and if the Master, on a reference to him, is unable to ascertain the difference in value, but the Purchaser is content to take such Interest as can be conveyed to him, with such Indemnity, as under all the circumstances the Master shall think just and reasonable, a Decree to that effect will, at the instance of the Purchaser, be made.

It is true, generally, but not universally[i], that a Purchaser may, if he pleases, *accept*, nay *insist* on compensation, if he undertakes on his part to do what the Court shall order[k]; but the Vendor cannot, it seems, (except where the Party gets, *substantially*, that for which he contracts[l],) insist upon the Purchaser's taking a compensation. If, therefore, a Purchaser agrees to buy a Freehold

[e] Hill v. Buckley, 17 Ves. 401.

[f] Milligan v. Cooke, 16 Ves. 1; and see what is said in Seaman v. Vawdry, 16 Ves. 275, and 290.

[g] See Halsey and Grant, 13 Ves. 77.

[h] Mortlocke v. Buller, 10 Ves. 316. but see the case as to an agreement to assign a lease, mentioned 1 Fonbl. 212. and what is said 1 Ves. and Bea. 225.

[i] Paton v. Rogers, 1 Ves. and Bea. p. 353.

[k] Ib.

[l] See Calcraft v. Roebuck, 1 Ves. Jun. 221. Drewe and Corp, 9 Ves. 368. Halsey and Grant, 13 Ves. 78; and see Horniblow v. Shirley, ib. 81. Dyer and Hargrave, 10 Ves. 507. M[c] Queen v. Farquhar, 11 Ves. 467. Alley and Deschamps, 13 Ves. 228.

Estate, he cannot be compelled to accept one that is Copyhold[m]. If a contract be for a House and a Wharf, the Wharf being the principal inducement to the purchase, a Purchaser will not, it seems, be obliged to take the House only[n]. And so, if Land be represented as Freehold, with Leasehold adjoining, and is found to be Leasehold only, the Purchase would not be enforced[o].

A Lessee, who described his Interest as fifty years, the residue of a Term, free from Incumbrances, but who in fact had only three years of an old Term, and a reversionary term from another Lessor, and old Incumbrances not shewn to be discharged, could not, it was determined, enforce a specific performance[p].

A Purchaser has been held not to be entitled to an abatement for a deficiency in the *quantity* of acres sold, where the particular described the Estate as containing by estimation, so many acres, "*be the same more or less*[q]."

Where a Bill is filed for the specific performance of a contract for the purchase of Real

[m] 4 Bro. C. C. 497. 9 Ves. 868.

[n] That was Lord Erskine's opinion in Stapylton and Scott, 13 Ves. 427. contrary to Sir Thos. Sewel's decision, mentioned in Seton v. Slade, 7 Ves. 270; and see what is there said by Lord Eldon, and the case as to tythe there mentioned; and see Poole against Shergold, 2 Bro. C. C. 118. see also Halsey and Grant, 13 Ves. p. 78. but see Drewe and Hanson, 6 Ves. 675.

[o] Fordyce and Ford, 4 Bro. C. C. 498; and see Drewe v. Corp, 9 Ves. 368. and Alley and Deschamps, 13 Ves. 228.

[p] White v. Folgambe, 11 Ves. 337.

[q] Winch v. Winchester, 1 Ves. and Bea. 375.

Estate, the Defendant, in ordinary cases, may, if he chooses, have a Reference to the Master, to see if a good Title can be made; and the Court never acts upon the fact, that a satisfactory abstract of the Title was delivered; unless the Party has clearly bound himself to accept the Title upon the abstract[r], as by taking possession for a considerable time, and making no objection to the abstract[s]. But the circumstance of an abstract being shewn to a Purchaser, previous to the filing of a Bill for a specific performance, in which the defect of Title appears, does not bind the Purchaser[t]. Though the Party cannot state any objection to the Title as it appears in the abstract, yet he may insist on a reference; and the reason seems to be, that by the ordinary Decree, in these cases, the other Party is compelled to produce all the deeds, papers, &c. in his custody or power; from which reasonable and solid objections to the Title may be furnished, which would never have fallen under the view of the Purchaser, unless the Court wrung from the conscience of the Vendor that sort of information, which a Purchaser could by no other means acquire: Inquiries and Examinations also may be directed, by which the Title may be sifted in a way, in which it never could, upon a

[r] Jenkins v. Hiles, 6 Ves. 594; and see Fludyer v. Cocker, 12 Ves. 25.

[s] Fleetwood v. Green, 15 Ves. 594.

[t] Stapylton v. Scott, 16 Ves. 274.

mere abstract, authenticated as the Vendor thought proper[v].

A Defendant, however, against whom a specific performance is prayed, may by his answer waive his right to a reference, and call upon the Court to decide upon his objections to the Title; but in such case the answer must be unequivocal, and the Defendant must not be drawn into it by surprise or fraud, and want of full information, and its propriety not rendered disputable by any subsequent discovery[w]. And this course seems highly reasonable, for if it clearly appears to the Court, upon the Pleadings and the Evidence, that there are irremoveable objections to the Title, it would be an idle and unnecessary expence to the Parties, to make a reference to the Master[x].

"I have heard it said,"—says *Sir Thomas Clarke*, "a Title purchased under a Court of Equity, must be like Cæsar's Wife, even without any suspicion[y];" and certainly the Court will always pause, where doubts raised upon a Title, are reasonable and fair, and will not compel a Purchaser to take Property, not marketable[z]. Many cases establish it as a Rule (impugned, indeed, in a very recent decision[a],) that though in the Judg-

[v] 6 Ves. 653.

[w] Jenkins v. Hiles, 6 Ves. 653, 655.

[x] See Omerod v. Hardman, 5 Ves. 731.

[y] Sedgewick v. Hargrave, 2 Ves. 57,

[z] See Marlow and Smith, 2 P. Wms. p. 201; and Lord Braybroke v. Inskip, 8 Ves. 428.

[a] See Biscoe v. Perkins, 1 Ves. and Bea. 492, 3.

ment of the Court, the better opinion is, that a Title can be made, yet, if there is a considerable, a rational, doubt, the Court has not attached so much credit to its own opinion, as to compel a Purchaser to take the Title, but leaves the Parties to Law: and this, whether the doubt arises as to the *quantity* of the Estate of which the Seller is possessed, or upon a *legal*[b] *objection*. Nor will a *case* for the opinion of a Court of Law, be directed, without the Purchaser's consent[c]; and if after a certificate of the Court of King's Bench, the Chancellor retains a doubt, a Purchaser will not be compelled to take the Title[d], but may require another case, directed to another Court[e].

And where the objection has been respecting the legitimacy of a Party, the Court has said there are many cases in which a Jury will collect the fact of legitimacy from circumstances, in which it might be attended with so much reasonable doubt, that the Court would not compel a Purchaser to take it, merely because there was a verdict[f].

But though the Court will not force a doubtful Title upon a Purchaser, yet in these cases, it seems, the Court will govern itself by a *moral certainty;* for it is impossible, in the nature of

[b] Stapylton v. Scott, 16 Ves. 274; and see Rose v. Calland, 5 Ves. 188, 189. and Cooper v. Denne, 1 Ves. Jun. 565. and Wheate and Hall, 17 Ves. 80.

[c] Roake v. Kidd, 5 Ves. 647.

[d] Sheffield v. Lord Mulgrave, 2 Ves. Jun. 529.

[e] Trent v. Hanning, 10 Ves. 500.

[f] See Lord Braybroke v. Inskip, 8 Ves. 428.

things, there should be a *mathematical certainty* of a good Title[a].

There are frequently suggestions of old entails, and often doubts, what Issue persons have left, whether more or fewer; and yet these were never allowed to be objections of that force, as to overturn a Title to an Estate[b].

It is no objection, for instance, to a Title, derived under a grant from the Crown, that there is a reservation of Royal Mines, if there has never been an exercise of the right, or a probability that there ever will; for there is no instance where the Crown has only a bare reservation of Royal Mines, without any right of Entry, that it has granted a licence to any person to come upon another Man's Estate, and dig up his Soil and search for such Mines; though, when they are once opened, they can restrain the Owner of the Soil from working them, and can either work them themselves, or grant a licence for others to work them[c].

Where the Title is clear, but there are Terms or Incumbrances to be got in, the established course is, that the Master reports in favor of the Title; and a Reference is made to him, to approve a Conveyance; and then the Question arises, whether all the parties to a proper Conveyance are brought before the Court, and if it appears all necessary Parties are not before the Court, such Persons must be made Parties[d],

[a] Lyddal v. Weston, 3 Atk. 20.

[b] Ib.

[c] Ib.

[d] See Arg. in Omerod v. Hardman, 5 Ves. 725.

otherwise, the Bill would be dismissed with Costs[d]. An Exception, therefore, cannot be taken to the Master's Report of a *good Title*, on the ground that the Trustee of an outstanding term is a Lunatic, for that is a question of *Conveyance*, not of *Title*[e].

It seems doubtful, whether upon a Contract to sell a Lease, the Vendor is bound to make out that the Lessor has a good Title[f]; but the prevailing opinion appears to be, that he is; and in general, where the convenience of the case requires it, it is provided in Particulars of Sale, or in private Agreements, that the Purchaser shall not insist on seeing the Lessor's Title.

If Assignees exhibit to sale a Freehold Estate of Inheritance, not marking by the Contract, that they meant to sell any thing more than it shall turn out the Bankrupt had, they are bound, as other persons are, to make a Title to the Inheritance, free from Incumbrances[g]; but an Executor, selling, is not bound to covenant for the Title[h].

When Conveyances are directed, by a Decree, they must be settled by the like kind of Rule as men of Judgment among Conveyancers would direct[i].

[d] See Loyde v. Griffith, 3 Atk. 267.

[e] Berkley v. Daugh, 16 Ves. 380.

[f] White v. Foljambe, 11 Ves. 337; and see Radcliffe v. Warrington, 12 Ves. 326. and Gompertz v. —— 12 Ves. 17.

[g] White v. Foljambe, 11 Ves. 345. and see Macdonald and Hanson, 12 Ves. 277, overruling the doctrine in Pope v. Simpson, 5 Ves. 145. S. P. Ex parte Trender, MSS. see also Spurrier v. Hancock, 4 Ves. 667. Macdonald and Hanson, 12 Ves. 277.

[h] Staines v. Morris, 18 Ves. 17.

[i] Loyd v. Griffith, 3 Atk. 267.

It is not necessary, in order to obtain a Decree for a specific performance, that the Vendor should have a good Title *at the time of the Sale*, for it seems, that if he can, even by an Act of Parliament, obtain a Title *before the Report*, that is sufficient[k]; and the Decree of the Court in these cases always is to inquire whether the Seller *can*, not whether he *could*, make a Title at the time of executing the Agreement[l].

A Purchaser, therefore, cannot insist on being discharged from his Purchase, upon the Master's Report of a defective Title, if the same is capable of being made good within a reasonable time: as where the Master's Report is, that the Vendor getting in a Term, or getting administration, &c. will have a Title; but the Court will put the Vendor under terms to procure that speedily[m].

The Court will not suffer a Plaintiff, at the distance of years, to come to the Court and say, he is ready to make a good Title, and call for a specific performance. Cases, however, of this description, must be governed by circumstances[n].

When, on a Reference to the Master, he reports that a good Title to a Purchase cannot be made, the Vendee may file a Bill against the Vendor to

[k] Langford v. Pitt, 2 P. Wms. 630. Mortlocke v. Buller, 10 Ves. 315; and see Jenkins v. Hiles, 6 Ves. 654. Wynn and Morgan, 7 Ves. 205, 6.

[l] Langford v. Pitt, 2 P. Wms. 630.

[m] Coffin and Cooper, 14 Ves. 205.

[n] Wynn v. Morgan, 7 Ves. 205, 6. Jenkins v. Hiles, 6 Ves. 646.

have the Contract delivered up; but it seems, that compensation will not be granted for the loss sustained by the failure of the Contract, though the Bill pray, in the alternative, a specific performance, or an Issue, or an Enquiry before the Master with a view to damages [o], that being more properly the subject of an Action [p]. In *Denton* v. *Stewart* [q], it is observable the defendant had it in his power to perform the Agreement, and put it out of his power pending the Suit. "That Case, if not supportable on that distinction, is not," says *Lord Eldon*, "according to the principles of the Court [r]."

It may be proper to observe in conclusion of this fruitful subject of Equity, that if the Purchaser does not pay the Purchase-money at the time fixed, he will be chargeable with Interest; and as he must bear any loss, so likewise will he be entitled to any profits that arise from the Estate [s].

In general, if a Purchaser is let into possession and perception of the Rents and Profits of the purchased Estates, he must pay Interest for his Purchase-money [t]; but it is not universally so [u]: there may be a case where he shall not pay In-

[o] Todd and Gee, 17 Ves. 273. which seems to overrule Greenaway v. Adams, 12 Ves. 395.

[p] Gwillim v. Stone, 14 Ves. 128.

[q] 17 Ves. 276. in note, mentioned also, 1 Fonbl. Eq. 43. and 2 vol. 438.

[r] 17 Ves. 276.

[s] Davy v. Barber, 2 Atk. 490.

[t] See Fludyer v. Cocker, 12 Ves. 25. Blount v. Blount, 3 Atk. 637.

[u] See Blount v. Blount, 3 Atk. 637.

terest, notwithstanding he has the Rents and Profits: as where there are objections to the Title, and the Purchase-money lays unproductive, and the Vendor has notice of that circumstance, and afterwards the Title is made good, the Vendee will be entitled to the Estate and the Rents and Profits, and the Vendor to the Purchase-money only, without interest[u]. And though, generally, a Purchaser cannot be called upon for his Money, until he has a Title, yet where he is let into Possession upon a mutual apprehension that the Title could be immediately made good, he cannot, without express Contract, retain the possession, without, at least, paying Interest for the Purchase-money[v].

Where the Vendee has created unnecessary difficulties, in respect of the Conveyance made to him, he will be ordered to pay Interest from the time he ought to have executed the Conveyance[w].

It seems doubtful whether when Interest is payable, it is at four or at five per Cent. The old Rule was four per Cent.[x], but in a very recent decision, five per Cent. was awarded[y].

Money paid in as earnest at the Sale of an Estate, in whatever manner laid out, is a payment

[u] See on this subject Powell v. Martyn, 8 Ves. 146.

[v] Gibson v. Clarke, 1 Ves. and Bea. 502.

[w] Blount v. Blount, 3 Atk. 637.

[x] Child v. Lord Abingdon, 1 Ves. jun. 94. Calcraft v. Roebuck, 1 Ves. jun. 221; and see Sugd. Vend. and Purch. 404. last Edition, and cases cited in note.

[y] Waldron v. Forester, Exch. 30 June 1807, particularly mentioned Sugd. Vend. and Purch. 405,6. &c.

for so much of the Purchase-money [z]. If laid out without opposition from the Seller it must be presumed to be with his assent. If laid out under the authority of the Court, it will be binding on both [a].

If a Vendee, who has not compleated his Purchase for want of a Title being made, deposits his Purchase-money, in the Purchase of Stock, and gives notice of such deposit to the Vendor, this will have the effect of stopping Interest; but the Vendee runs all the hazard of the rise and fall of the Funds, nor in case of a rise, can the Vendor claim the benefit [b].

Where a Trust is raised by Deed or Will for the payment of Debts or Legacies generally [c], (and the Rule is the same where there is a general charge,) and afterwards a specific disposition [d], a Purchaser or Mortgagee of real Estate is not obliged to see to the application of his Money, as he is, where there is a *Schedule*, or particularizing of the Debts [e], unless there be any collusion between the Purchaser and the Trustee or Executor [f]. If more Land is sold than is sufficient to pay the Debts, that will not prejudice a Purchaser [g]. But though a general charge does not oblige a Purchaser before a Suit, to see to the

[z] Doyley against Powis, 2 Bro. C. C. 32.

[a] Poole against Rudd, 3 Bro. C. C. 49.

[b] Roberts v. Massey, 13 Ves. 561.

[c] See Co. Lit. 290. b.

[d] 6 Ves. 654. in n.

[e] Ithell v. Beane, 1 Ves. 215. Dunch v. Kent, 1 Vern 260, 1 Spalding v. Shalmer, 1 Vern. 301. Hardwicke v. Mynd, 1 Anstr. 109.

[f] Rogers against Skillicorne, Ambl. 189. Lloyd v. Baldwin, 1 Ves. 173.

[g] Spalding v. Shalmer, 1 Vern. 301.

application of the Money, yet after a Suit commenced, it seems, he is bound to see to the application[h]. And where Lands are vested in Trustees, by Act of Parliament, to be mortgaged for a particular purpose, it is incumbent on the Mortgagee to see the Money applied accordingly[i].

A Purchaser of an Estate under the Decree of the Court, is not answerable for the Mode in which the Estate has been sold by the Court, nor for the disposition which the Court makes of the Money[k].

VI. TRUSTS.

We now proceed to the consideration of *Trusts*, a species of Jurisprudence peculiar to this country[a], and of all others, the most fruitful in cases, and comprehending a great variety of Learning; but the Rules on this subject, were in the time of *Lord Hardwicke*, as he has observed, "pretty well ascertained[b]," and have since been still more reduced to certainty, by the decisions of the great men, who have succeeded him.

Trusts, may be created of Real, or Personal Estate; and are, either, 1. *Express*, or, 2. *Implied*: under which head of implied Trusts, may

[h] Walker v. Smallwood, Ambl. 677.
[i] Cotterel v. Hampson, 2 Vern. 6.
[k] Curtis v. Price, 12 Ves. 103. Lloyd v. Jones, 9 Ves. 65. Lutwych against Winford, 2 Bro. C. C. 248; but see Lloyd v. Baldwin, 1 Ves. 173.
[a] 1 T. R. 759. in N.
[b] Letter to Lord Kaims, Life of Kaims, 1 Vol. 243.

be included, *resulting* Trusts, and all such Trusts as are not express. *Express Trusts*, are created by Deed, or by Will; *Implied Trusts* arise, in general, by construction of Law, upon the acts or situation of Parties.

Every *Cestui que Trust*, whether a volunteer, or not, with, or without consideration, is entitled to the aid of a Court of Equity, to avail himself of the benefit of the Trust [c]; and, as between the *Cestui que Trust* and his Trustee, (unless the Trustee is such by *Implication* only) the Statute of Limitations does not apply [d].

Uses led the way to Trusts. Indeed, Uses and Trusts were similar in their original, and both resemble the *Fidei Commissum* of the Civil Law [e], as introduced by *Augustus* [f]. The definition of an use before the Statute of Uses [g], may still be applied, not only to such uses as are not affected by that Statute, but to Trusts [h], which had their origin subsequent to the Statute, and in consequence of it. It was defined to be, a confidence reposed in another, who was made Tenant of the Land, or Terre-Tenant, that he should dispose of the Land according to the intention of Cestui que Use, or him to whose use it was granted, and suf-

[c] 3 P. Wms. 222.

[d] Townshend against Townshend, 1 Bro. C. C. 551. and see Beckford v. Wade, 17 Ves. 87.

[e] Blackst. Comment. 2 Vol. p. 327. Gilbert on Uses, p. 3. last Edition, Bacon on Uses, 19. Use of the Law, 153.

[f] Inst. Lib. 2. Tit. 23. s. 1. in præmeo.

[g] 27 Hen. 8. c. 10.

[h] Sparrow v. Hardcastle, 3 Atk. 798.

fer him to take the Profits[i]. Where, therefore, a Feoffment was made to A. and his Heirs, to the use of (or in Trust for) B. and his Heirs, A. the *Terre-Tenant* had the legal Property and possession of the Land, but *B.* the *Cestui que Use*, was, in a Court of Equity, held to be entitled to the profits, and to the disposal of the Estate[k].

Uses proved seriously inconvenient in many respects; more especially, by avoiding wardships and Forfeitures to the Crown[l]. All the ill consequences of them, are enumerated in the preamble to the *Statute of Uses*[m]; by which Statute, the Use is *executed;* i. e. the possession is conveyed to the use, and the *Cestui que Use* is made compleat Owner of the Lands and Tenements as well at Law as in Equity. The Equitable Estate in the *Cestui que Use* before the Statute, was turned into a legal Estate, and having all the consequences attached to a legal Estate, the Evils incident to Uses were remedied.

The common Law Judges, before whose Tribunal, Uses so converted into legal Estates, were determined upon, decided that, a *Use could not be raised upon a Use*[n], and that on a Feoffment to A. and his Heirs, to the use of B. and his Heirs, in trust for C. and his Heirs, the Statute executed only the first use, and that the second was a mere

[i] Plowd. 352. Gilb. on Uses, p. 1. Chudleigh's Case, 1 Rep. 121.
[k] 2 Black. Com. 327.
[l] Lloyd v. Spillet, 2 Atk. 150. S. C. 3 P. Wms. 341. Barn. 384.
[m] 27 Hen. 8. c. 10.
[n] 36 Hen. 8. Tyrell's Case, Dy. 155. A.

nullity. They were not, perhaps, blameable in this. They adhered, as by their oaths and by the constitution they were bound to do, to the strict letter of the Statute. And though by their rigorous interpretation of the Statute, they occasioned the opening again of the doors of Courts of Equity, which the Statute had almost shut, their inflexibility is not therefore to be lamented, as that great constitutional lawyer, *Sir Robert Atkyns*, somewhat peevishly insists[o]; but must be matter of exultation to every one, who has soundly reflected on the Legal Polity of this country.

The Judges also held, that as the Statute mentions only such persons as were *seized* to the use of others, it did not extend to *Copyholds*[p], or to *Terms of Years*, or other chattel Interests, whereof the Termor is not *seized*, but only *possessed*; and, therefore, if a term of one thousand years was limited to A. to the use of (or in Trust) for B. the Statute did not execute this use, but left it as at Common Law[q]. They further held that, where Lands are limited to Trustees to receive and pay over the Rents and Profits, the use is not executed, but the Lands remain in them to answer those purposes[r]. Where, therefore, there is a Convey-

[o] Enquiry into the Jurisdiction of the Court of Chancery in Causes of Equity.

[p] Co. Copyh. s. 54. Cro. Car. 44. 2 Ves. 257.

[q] Bac. Uses 42. Poph. 76. Dyer. 369. 2 Black. Com. 336.

[r] 36 Hen. 8. Bro. Feoff. al. Uses, 52. 2 Black. Com. 336. Har. Co. Litt. 290.[b] n. 1. s. 2. Treatise of Equity, Book 2. Ch. 1. s. 4.

ance to Trustees in Trust *to convey*[s], or to *sell*[t], or to pay the Profits to a *Feme Covert*[u]; and as it seems in all cases, where any controul and discretion is given to the Trustees in the application of the Profits of the Estate, as to pay Annuities[v], or to make repairs, or to provide for the maintenance of the *Cestui que Trust*, the legal Estate remains in the Trustees, unexecuted by the Statute[w].

It was observed by *Lord Hardwicke*, that the Statute of Uses, "has had *no other effect than to add at most three words to a Conveyance*[x];" but that position seems very questionable. The Statute remedied the inconveniences it professed to remedy; and though a new species of uses, under the name of Trusts, afterwards sprung up, yet the Courts of Equity took care that while they answered all the good purposes of Uses, they should not produce any of the inconveniences which the Statute of Henry the 8th was intended to avoid.

As *Uses executed* are to all intents and purposes, *legal Estates*, it is not within the design of this Work to treat on them more at length. The

[s] Bac. Uses, 8. Roberts and Dixwell, 1 Atk. 607.

[t] Bagshaw v. Spencer, 2 Atk. 578. Wright v. Pearson, Ambl. 360.

[u] Pybus and Smith, 3 Bro. 340. Neville v. Saunders, 1 Vern. 415. Harton v. Harton, 7 T. Rep. 652.

[v] Doe on dem. White v. Simpson, 5 East. 162. and see Gibson v. Rogers, Ambl. 93.

[w] See 2 Vol. Blac. Com. 336. n. 12. by Mr. Christian, Silvester v. Wilson, 2 T. R. 444. Shapland and Smith, 1 Bro. 75.

[x] Hopkins v. Hopkins, 1 Atk. 591. Blackstone, 2 Com. 336. says also, with this passage in his eye, the Statute has had "little other effect than to make a slight alteration in the formal words of a Conveyance." I have a very full MS. note of Hopkins v. Hopkins, but there is no such remark as that alluded to in Atkyns's Report.

doctrine as to the *creation*, the *limitation*, and the *extinguishment* of uses, as well as of *resulting* uses, belongs principally to the consideration of Courts of Law ; nor is it here required to observe on the various Conveyances operating under the Statute of Uses ; such as those which pass Uses by *transmutation of Possession*, as a *Feoffment*, *Lease and Release*, *Fine and Recovery;* or those which raise Uses, *without a transmutation of possession*, as a *Bargain and Sale*, or a *covenant to stand seized*[y] ; nor on the doctrine of *Springing and Shifting Uses*, or Uses operating through the medium of *Powers:* such as powers, so common in modern settlements, and very prudent[z], of *leasing*, *jointuring*, *charging*, *selling*, or *exchanging* ; or of *powers of revocation*[a]. All these doctrines relate to what are considered as legal powers over legal Estates, and, as such, (except where there has been a mistaken execution of a Power[b], or where the Power is coupled with a Trust[c], upon which we have before observed[b],) are within the adjudication of Courts of Common Law ; nor have Courts of Equity any original or exclusive power to decide upon them. These matters, it is true, are often considered in Courts of Equity, and a thorough knowledge of them is indispensable ; but it is to the Common Law Writers, and to the Common Law Reports,

[y] These Conveyances are well observed upon by Mr. Butler in his note to Co. Litt. 275[b]. 276[a].

[z] See Sutton v. Jones, 15 Ves. 588.

[a] The subject of Powers, and all the doctrine which surrounds them, is treated of in a very masterly manner in Mr. Sugden's work on Powers.

[b] Ante, p. 44.

[c] See ante, p. 46.

that reference must be had, for the most authoritative decisions on these subjects.

Indeed, a Person having a *legal Estate* only, and no beneficial Interest, cannot, it seems, come into Equity for any purpose [c]. It may, however, be remarked, that the Courts of Common Law in their decisions upon the creation of Estates, by way of Use, shew more indulgence to the intent of the Parties, than they do in regard to the creation of Estates by Conveyances at Common Law[d].

It is to *Trusts*, and Trusts only, that the Reader's attention will here be particularly directed—to that "*creature of Equity*," as it is called, of which the Common Law takes no notice, and over which, Courts of Equity have an *original*, a *peculiar*, and *exclusive*, Jurisdiction.

In the definition of an Use, as it existed before the Statute of Uses, Trusts have already been defined. A Trust is in other words a right in the *Cestui que Trust*, to receive the Profits, and to dispose of the Lands in Equity [e], and is such a confidence between Parties, that no Action at Law will lie [f]. There may, however, be special Trusts, as for the accumulation of Profits, the Sale of Estates, or the conversion of one Trust Fund into another, which may preclude all power of in-

[c] See Williams v. Lord Lonsdale, 3 Ves. 757.

[d] 2 Vol. Fonbl. Eq. p. 47. in note.

[e] 1 Mod. 17.

[f] Sturt v. Mellish, 2 Atk. 612.

terference on the part of Cestui que Trust, until such special Trust be satisfied [g].

In general, Courts of Equity in the *construction of Words*, by which Trusts are *limited* of real or personal Estate, follow the Rules which Courts of Law have laid down, in regard to the creation and limitation of legal Estates [h]; and this, whether the Trust be created by Deed or by Will [i]. Whether the words in a Deed or a Will, pass an absolute or a limited Interest, is decided by Rules common to both Courts [k]; the only difference being, that where a Trust Estate is created by Deed or Will, it is determined upon in Courts of Equity, and where a conveyance or a devise is of a legal Estate, it is determined on in Courts of Common Law; but the decision, in each Court, in the construction of words of limitation, is guided by the same Rules.

The principal exceptions to this general Rule, are in the cases, of *Articles before Marriage*, already adverted to under the head of Mistake [l], and in the cases of what are termed *Executory Trusts*; which will presently be adverted to.

The *Cestui que Trust* has, in most respects, the same power over the Trust Estate, as owners of

[g] Sanders on Uses, 1 Vol. 215. last Edition.

[h] Duke of Norfolk's Case, 3 Cha. Cas. 48. Bale v. Coleman, 1 P. Wms. 143. Garth v. Baldwin, 2 Ves. 655. Watts v. Ball, 1 P. Wms. 108. Banks v. Sutton, 2 P. Wms. 713.

[i] Wagstaff v. Wagstaff, 2 P. Wms. 259.

[k] See Duke of Norfolk's Case, 3 Cha. Cas. 48.

[l] Ante, p. 50.

legal Estates are possessed of; and the Trust Estate is, in general, liable in the same manner as a legal Estate, except in respect of Dower[m]. He may *alien* it; and any legal conveyance or assurance by him has the same effect and operation upon the Trust, as it would have had, at law, upon the legal Estate[n].

The effect of a *Fine* is the same as at Law with regard to an equitable Interest, if of such a nature, that, turned into a legal Interest, it would have been barred[o]. *A Common Recovery* suffered by a *Cestui que Trust* in Tail, in possession, bars all equitable remainders depending upon such Estate Tail, although there was no legal tenant to the Præcipe[p], but it does not bar a *legal* remainder. To bar *legal* remainders by Common Recovery, there must be a *legal* Tenant to the Præcipe[q]; nor will such a Recovery be efficient, if there be an Estate for Life in another, prior to such Estate Tail[r]; or if the Estate for Life be *equitable* with a *legal* remainder in tail[s]; but, it seems, an Equitable Recovery is good, although the Equitable Tenant to the Præcipe has the legal Estate[t].

It is doubtful, whether there can be an *equitable*

[m] See as to this post.

[n] North v. Champernon, 2 Ch. Cas. 63. 78. Botteler v. Allingham, 1 Bro. C. C. 72.

[o] Willis v. Shorrall, 1 Atk. 476. and see 1 Vern. 440.

[p] North v. Way, 1 Vern. 13. and see Burnaby v. Griffith, 3 Ves. 276, 7.

[q] Robinson v. Cumming, For. 164. S. C. MS. 1 Atk. 473. Selwin v. Thornton, Ambl. 545, 699. and 1 Bro. C. C. 73. in note. Boteler v. Allingham, 1 Bro. C. C. 72.

[r] North v. Champernon, 2 Ch. Ca. 63. 78.

[s] Shapland v. Smith, 1 Bro. C. C. 74. Robinson v. Cumming, 1 Atk. 473.

[t] See this point discussed, Sugden Vend. and Purch. 287.

disseisin, so as to prevent an equitable Tenant in Tail, suffering an equitable recovery [u].

It was holden in several cases, that the Tenant in Tail of an Equitable Estate, might by bare articles[v], or by a Devise, or a Feoffment, bar the entail[w]; but *Lord Hardwicke* decided expressly to the contrary, and held that a Tenant in Tail of a *Trust* Estate with Remainders over, cannot by Will or Settlement, bar the Remainders, without a Recovery, any more than Tenant in Tail of a legal Estate [x].

Upon its being urged that a Lease and Release would bar an equitable Entail, *Lord Hardwicke* said, "It was never so determined, and I hope never will[y]."

The Cestui que Trust may *devise* the Trust Estate [z]: By his *Treason* [a], or *Felony* [b] he forfeits it. It is subject to an *Extent* [c], (unless it be a Trust of a term of years,) and it may be taken in *execution* [d]. If the Equitable Title is not acted upon in the same time the legal Title should, it is barred [e].

So, Trust Estates, *descend* in the same manner

[u] Lord Grenville v. Blyth, 16 Ves. 224.

[v] Bates v. Bayley, 2 Vern. 226.

[w] Otway v. Hudson, 2 Vern. 583. Woolnough v. Woolnough, Pre. Ch. 228. 1 Vern. 14.

[x] Kirkham against Smith, Ambl. 518. S. C. 1 Ves. 260. and see 2 Vern. 552. Legate v. Sewell, 1 P. Wms. 91. Burnaby v. Griffin, 3 Ves. 277. Tollett v. Fletcher, 5 Ves. 13.

[y] Kirkham v. Smith, 1 Ves. 260. S. C. Ambl. 518.

[z] Greenhill v. Greenhill, 2 Vern. 680.

[a] See 33 Hen. 8. c. 20. s. 2.

[b] Hob. 214. Hard. 490.

[c] Hard. 495.

[d] See 29 Ch. 2. c. 3. s. 10.

[e] Medlicot v. O'Donel, 1 Ball and Beatty, 167. Hovendon v. Lord Annesley, 2 Sch. and Lefr. 630. Bonny v. Ridgard, 4 Bro. C. C. 138. Andrew v. Wrigley, 4 Bro. C. C. 125. Townshend v. Townsend, 4 Bro. C. C. 138.

as legal Estates do, whether Customary, (as Borough English, or Gavelkind) or otherwise[f]: and there may also be a *possessio fratris* of a Trust[g], as by the Common Law, there was of an Use[h].

The Power of the Trustee over the legal Estate, vested in him, exists only for the benefit of the *Cestui que Trust.* He may, indeed, by means of that power, prejudice the *Cestui que Trust*, by *alienating* the Estate, either wholly, or partially, (as in the case of a Mortgage) to a purchaser, for a valuable consideration, (a *voluntary* conveyance would have a different effect[i];) but such an abuse of Trust can hardly occur, unless where a Trustee is in possession of the Trust Estate, and even then very rarely. But a Judgment against the Trustee, or a Commission of Bankruptcy against him[k], will not, in Equity, affect the Estate, nor can his Wife claim *Dower*, or *Free bench* out of it[l], nor can the Husband of a Female Trustee be entitled as Tenant by the Curtesy[m].

It has been doubted whether a Trustee will by *Treason* or *Felony* forfeit the Trust Estate; and it has been questioned whether, supposing a Forfeiture, the Lord who claims by Escheat, or the Crown claiming by that Title, is bound by the

[f] Banks v. Sutton, 2 P. Wms. 713. Fawcet v. Lowther, 2 Ves. 304. and see 2 P. Wms. 736.

[g] 2 P. Wms. 713, 736.

[h] Corbet's Case, 1 Rep. 88[a].

[i] Pye v. George, 1 P. Wms. 128. Saunders v. Dehew, 2 Vern. 271. Daniels v. Davison, 16 Ves. 249.

[k] Finch v. Earl of Winchelsea, 1 P. Wms. 278. Bennett v. Davis, 2 P. Wms. 318. 3 P. Wms. 187. note A. quot. 1 Sand. on Uses, 279. and see Medley v. Martin, Finch 63.

[l] Hinton v. Hinton, 2 Ves. 634, 638. Noel v. Jevon, 2 Freem. 43. Bevant v. Pope, 2 Freem. 71. quot. 1 Sand. on Uses. 279.

[m] Casborn v. Inglis, 7 Vin. 157.

Trust [n]; but by a very recent Statute [o], it is provided that, where Trust Property escheats to the Crown, His Majesty *may* direct the execution of the Trusts, and *may* make grants to Trustees for that purpose, or *may* make Grants to any persons for the purpose of restoring the same to any of the family of the Persons whose Estates the same had been, or of rewarding any persons making discovery of the Escheat: but it does not determine, in what cases, Lands escheat; for escheat, it must be remembered, may be *ob defectum tenentis*, as well as, *pro delicto tenentis*.

A Trustee may *devise* the Trust Estate, but the devisee takes the Estate subject to the original Trust [p]. But though, even under general words [q], the Trust Estate may so be devised, yet wherever the Trusts under which the Trustee's Property is devised, are inconsistent with the supposition that the Trust Estate was meant to be included in the devise, it will be presumed they were not intended to pass, and will not pass [r].

It is observable that by whatever means, whe-

[n] In Comyn's Digest, Tit. Forfeiture, B. 1. it is said the Lands are not forfeited; but in Wike's Case, Lane, 54. Jenkins, 190. Cas. 92. Hard. 466. Brooke, Feoffment al. Uses, pl. 31. Vin. Abr. Uses, pl. 4. in note quoted, 2 Fonbl. Treat. Eq. 168, in notes, it seems to have been taken for granted; and the only question was, whether the Crown was bound by the Trust, which they decided in the Negative; but as to that see Geary v. Bearcroft, Carter 67. Eales v. England, Prec. Chan. 200. 1 Eq. Abr. 384. in note. Burgess and Wheate, 1 Bl. Rep. 123.

[o] 39, 40 Geo. 3. c. 88. s. 42.

[p] Braybrooke v. Inskipp, 8 Ves. 417. Marlow and Smith, 2 P. Wms. 200.

[q] Marlow v. Smith, 1 P. Wms. 97. 1 Atk. 605. in note.

[r] See Lord Braybroke v. Inskipp, 8 Ves. 435. Reade v. Reade, 118. 8 T. R. which cases overrule Attorney General v. Buller, 5 Ves. 339. and what is said 1 Bro. C. C. 198.

ther by Conveyance or otherwise, a Person obtains the absolute Ownership at Law of the Estate, though he acquired that by an equitable Title, and both either come together or are afterwards united in him, the legal Estate will prevail, and the equitable Estate is totally gone for the purpose of being acted upon in a Court of Equity[a].

It may also be remarked, that where Property is bequeathed in Trust, but no Trustee is appointed, the Court in the case of *real Estate*, considers the *Heir at Law* as a Trustee; and in regard to *personal Estate*, considers the *personal representative* as a Trustee, and will, itself, see to the execution of the Trust[a].

Where an Estate, for instance, is devised in Trust, to a Body Corporate, which by the Statute of Mortmain, cannot take, the Uses are not defeated by this deficiency of the Trustee, but attach upon the Estate the Law raises, and the Heir at Law becomes a Trustee to the Uses of the Will[b].

Having made these few brief observations, upon the general nature of Trusts, and limited the bounds of our Enquiry, we may proceed to consider,

1. *Express Trusts created by Deed.*

The conveniencies and necessities of Mankind daily give rise to a vast variety of express Trusts, created by Deed; nor is it here pretended to enu-

[a] Selby v. Alston, 3 Ves. 342.
[a] Vid. White v. White, 1 Bro. C. C. 12.
[b] Souley v. Master, 1 Bro. C. C. 81.

merate all of them, but only such as are of the most importance, and in common use: such as 1. Trusts created in *Marriage Settlements* of real or personal Property—2. In Conveyances to *Purchasers*—3. In Conveyances by way of *Mortgage*, or otherwise, for the *payment of Debts;* and 4. In Assignments of *Choses en Action.*

1. *Settlements* may be made either of real or personal Property, or both; and subject to the rules by which the boundaries of Limitations and Accumulations of personal Property are fixed[c], a Settlement may be made according to the pleasure of the Settlers. Personal Estate may, by a careful Settlement, be rendered unalienable as long as real Estate.

Terms for Years, or *personal Chattels*, may be limited or devised in *Strict Settlement* to one for Life, and afterwards to Sons and Daughters in

[c] See 39 and 40 Geo. 3. c. 98. an Act wrongly attributed to Lord Eldon, see 11 Ves. 148. Previous to the Act of Parliament a person might by executory Devise, dispose of his Property, and the accumulation of Rents and Profits for a Life or Lives in being, and 21 years, and a small portion of time, the period of gestation. This was one of the points determined in the great Case of Thellusson v. Woodford, 4 Ves. 227. or, in other words, he might order an accumulation to go on during that period of time, during which the Law permits the Estate to lay unalienable; but by that Act, the accumulation is limited.

A Trust by Will, for accumulation beyond the time allowed by the Statute, is void only for the excess. Where, therefore, the accumulation was directed to be during a Life, it was held not to be void under that Statute, but to be good for twenty-one years, if the Life so long continued, and only void for the excess, that is to say, for so long as the Life continued after that period. Griffiths v. Vere, 9 Ves. 131; and see Longdon v. Simpson, 12 Ves. 295.

Tail[d], and may be rendered transmissible as *Heir Looms* are; but such Property cannot be made unalienable longer than Lives in being, and twenty-one years after, or in the case of a *posthumous* Child, a few months more[e]. If the executory Limitations of Personalty are on Contingencies too remote, the whole property is in the first taker; and whatever words would give a clear *Estate Tail*[f] in *Land*, will give the absolute Property in *personal* Estate[g], because no Recovery could be suffered of such an Entail[h]; but this doctrine, it seems, does not hold, in cases, where, against the common import of the words, an Estate Tail is raised, by an ingenious construction of a Will, to effectuate the general intention[i].

Estates *pur autre vie* may be devised or limited in *strict Settlement* by way of *Remainder*, like Estates of Inheritance; and such as have Interests in the nature of Estates Tail, may bar their Issue, and all Remainders over, by *alienation* of the Estate

[d] Vid. Har. Co. Lit. 18ᵇ. n. 7. 20ᵃ. n. 5.

[e] Sheffield v. Orrery, 3 Atk. 287. Higgins v. Dowler, 2 Vern. 600. But that case is incorrectly reported as noticed in Clare v. Clare, MS. Stanley v. Lee, 2 P. Wms. 618. Sabberton v. Sabberton, For. 55. S.C. MS. Dolley v. Sparrat, MS. and see Cambridge v. Rous, 8 Ves. 24. and 12 Ves. 218.

[f] Jacobs v. Amyatt, 4 Bro. C. C. 543.

[g] Tatton v. Molineux, Polex. 24. Moore 809. Ivie v. Ivie, 1 Atk. 430. Daw v. Lord Chatham, 7 Bro. P. C. 453. Toml. Edit. Butterfield v. Butterfield, 1 Ves. 133. Fearne on Executory Devises 464,5. 6th Edit. Glover against Strothoff, 2 Bro. C. C. 33. Chandless v. Price, 3 Ves. 99. more fully stated 13 Ves. 479. in note.

[h] Fordyce v. Ford, 2 Ves. 539.

[i] Chandless v. Price, 13 Ves. 480. in note.

pur autre vie: nor is the having of Issue necessary to the giving effect to such alienation [k].

An *Annuity* cannot be entailed. When granted with words of Inheritance, it is descendible; but as to its security, is personal only: it may be granted in fee; of course it may as a qualified or conditional fee, which must end or become absolute in the life of a particular person; but it cannot be entailed, and consequently there can be no Remainder of it, for there can be no Remainder of Property which is not within the Statute *de Donis* [l].

Where *Leasehold* Estate is intended to be settled with *real* Estate, the mode of doing it, is, either by special Limitations [m], or if general words are preferred, the Deed directs that it shall go along with the real Estate as long as the rules of Law and Equity will permit it to be enjoyed with the real Estate; that is, until a Recovery *can* be suffered; viz. till the age of twenty-one of the Tenant in Tail; but the rule of Law will not allow it to go farther; whereas the other will go *till* a Recovery [n].

The exigencies of Families give rise to various forms of Settlement; nor is it here intended to notice all the variety of Trusts that are to be found in Settlements, but only the most important of those that are usually resorted to.

[k] Harg. Co. Litt. 20. n. 5.

[l] Turner against Turner, 1 Bro. C. C. 324,5.

[m] As in Pelham v. Gregory, 5 Bro. C. C. 435.

[n] Watkins v. Lea, 6 Ves. 641.

In the ordinary Settlements of real Estate in strict Settlement by the intended Husband, a Trust is usually created, to secure a Rent-charge to the intended Wife, for her Life, in case she survives her Husband, in bar of Dower.

If the intended Husband has no *real* Estate, on which to charge a Jointure, a sum of Money is, in general, invested in the Funds in the name of Trustees, in Trust, upon the Husband's death, to pay the Wife the Dividends.

Any provision, it seems, however inadequate or precarious it may be, which an *adult* before Marriage agrees to accept, in lieu of Dower, will amount to a good equitable Jointure.

A female Infant (as hath been before observed) may by Agreement before Marriage bar herself of Dower[o], Freebench[p], or her thirds; provided the provision be as certain as her thirds[q]; but it has been held, that she may, on her Husband's death, *elect* to take under the Settlement, or, to take her Dower or her thirds, as if there were no Settlement[r]; but if she does Acts after his death, shewing acquiescence under the Settlement, it will be binding[s].

As a Woman may by agreement or composition before Marriage, bar herself of her customary

[o] Earl of Buckinghamshire and Drury, 5 Bro. P. C. 570. Chitty v Chitty, 3 Ves. 545.

[p] Walker v. Walker, 1 Ves. 54.

[q] Carruthers v. Carruthers, 4 Bro. C. C. 500. Smith v. Smith, 4 Ves. 189.

[r] Glover v. Bates, 1 Atk. 439. Archer v. Pope, 2 Ves. 525.

[s] Archer v. Pope, 2 Ves. 527.

Share[t], or her thirds[u]: so it is a rule, that where a Wife has compounded with her Husband, he is considered, in regard to the custom, as leaving no Wife[v], and is not considered as a purchaser of her third[w].

So, if the Husband covenant to release the orphanage Share of his intended Wife, this operates as an extinguishment of the Wife's right to the orphanage part[x].

And if a Freeman of London, before Marriage, settles part of his personal Estate upon his intended Wife, to take effect after his death, without mentioning it to be in bar of her customary part; this will bar her of such customary part[y]; but a *Jointure* made by a Freeman on his Wife, and expressed to be, *in bar of Dower*, will not bar the Wife's claim to a *customary* Share[z].

Where a Provision for a Wife, in articles before Marriage, was declared to be in full satisfaction of Dower, or any claim or right by common Law, Custom of the City, or any other Law or Usage notwithstanding, this was held to bar the Wife from claiming under the *Statute of Distributions*[a]; and, it seems, it would preclude her

[t] Blunden v. Barker, 1 P. Wms. 633. S. C. 10 Mod. 451. Read v. Snell, 2 Atk. 644.

[u] Glover v. Bates, 1 Atk. 439.

[v] 2 Atk. 644; and see Love v. ———, 1 Vern. 6.

[w] Druce v. Dennison, 6 Ves. 393. Morris v. Burroughs, 1 Atk. 403.

[x] Ives v. Medcalfe, 1 Atk. 64.

[y] Lewin v. Lewin, 3 P. Wms. 15.

[z] Babbington v. Greenwood, 1 P. Wms. 530. S. C. Pre. Ch. 505.

[a] Glover v. Bates, 1 Atk. 439; see Benson v. Bellasis, 1 Vern. 15.

from claiming her *Paraphernalia* under the *Custom of London*[b].

Provisions made by Settlements, though not expressed to be in bar of Dower, amount frequently to an implied bar. A Provision, for instance, by Covenant in a Marriage Settlement, has been holden to amount to an implied bar of Dower[c]. And where a Husband covenanted to leave, or to pay at his death a Sum of Money to a Person, who, independant of that Engagement, by the relation between them, and the Provision of the Law, attaching upon it, would take a Provision, the Covenant is to be construed with reference to that; and the Court will not look upon the slight difference between *leaving* and *paying*, or whether Payment is to be within three, or six Months[d].

It has been generally laid down that in all cases where a Husband makes a Settlement of his own Estate on his Wife, in consideration of her Fortune, the Wife's Portion, though consisting of *choses in action*, and though there be no particular Agreement for that purpose, is considered as *purchased by him, and will go to his Executors*[e]; but later cases seem to establish that, the Husband does not by a Settlement become a Purchaser of the Fortune that may *afterwards* come

[b] Read v. Snell, 2 Atk. 642. Benson v. Bellasis, 1 Vern. 15.

[c] Vid. Garthshore v. Chalie, 10 Ves. 20.

[d] Ib. 10 Ves. 13. but see Kirkman v. Kirkman, 2 Bro. C. C. 95.

[e] Cleland v. Cleland, Pre. Ch. 63. Blois v. Martin, 2 Vern. 501. Packer v. Wyndham, Pre. Ch. 412. and see note D. to 3 P. Wms. 199.

to his Wife, if the Settlement be expressed, or imports to be [f], in consideration of her Fortune, as specified and described in the Deed itself; and Property afterwards coming to her, and not reduced into Possession by the Husband, would survive to her [g]; but if the Settlement is in consideration of the Fortune, *she is*, or *may be* entitled to [h], or the contents of the Settlement plainly import that, as much as if it was expressed, in such Case, if any thing comes afterwards, during the Coverture, to the Wife, the Husband is considered as a *Purchaser*, and takes it.

Where there is an Agreement between Husband and Wife before Marriage, that the wife shall have to her separate Use either the whole or particular parts of her personal Estate, she may dispose of it by an act in her Life, or by Will, and she may do it by either, though nothing is said of the manner of disposing of it. It is different as to her *real* Estate, for that will descend to her heir at Law, and that more or less beneficially; for the Husband may be Tenant for Life; if they have Issue; otherwise not; but still it descends to her Heir at Law. A Woman, however, on her Marriage may, without a fine, dispose of her real Estate, and prevent its going to her Heir at Law; but that, it seems, can only be done, either by way of Trust, or power over an Use. In the first instance, suppose a Wo-

[f] Carr v. Taylor, 10 Ves. 579.

[g] Salwey against Salwey, Ambl. 692. Garforth v. Bradley, 2 Ves. 677.

[h] Mitford v. Mitford, 9 Ves. 95, 6.

man having a real Estate before Marriage, and either before or after Marriage, by a proper Conveyance, (if after Marriage, it must be by Fine) conveys that to Trustees, in trust for herself during her coverture, for her separate Use, and afterwards that it shall be in Trust for such Person, as she shall by any Writing under her hand and seal, or in nature of a Will appoint, and in default of appointment, to her Heirs, and she makes such an appointment, that will be a good declaration of the Trust, and the Heir at Law would be remediless [i].

For though, in the notion of the Law, a Wife cannot make a Will [k], yet, where she has a separate power over her Estate, she may dispose of it by Will, and it must be propounded as a Will in the Spiritual Court [l]; and if the Wife has not appointed an Executor, the Court will grant administration to the Husband, with the Paper or Testamentary Schedule annexed [m].

Whoever takes under such Will, takes by virtue of the execution of the power, and by the power coupled with the Writing, and as if the limitation in that Writing of appointment had been contained in the Deed creating the power. But notwithstanding that, and though such Writing is not a proper Will, it has the effect and

[i] Peacocke v. Monk, 2 Ves. 190. Wright against Englefield, Ambl. 468. Wright v. Cadogan, 6 Bro. P. C. 156.

[k] See George against ——— Ambl. 627.

[l] See Henley v. Phillips, 2 Atk. 48.

[m] Ross v. Ewer, 3 Atk. 160.

consequence of a Will to three intents: First, The words are to have the like construction as if it was a proper Will; Secondly, Such Will is ambulatory until the death of the Testatrix, and therefore though the party taking thereby, takes by virtue of, and under the power, yet notwithstanding that, such appointee must survive the Testatrix, before he can take; Thirdly, If they do survive the Testatrix, they can take only from the time of the death of the Testatrix, and do not take as from the time of the power[n].

So, the Wife may dispose of her Estate, by way of power over an Use: as if she conveyed the Estate to the Use of herself for Life, remainder to the Use of such persons, as she by any Writing, &c. should appoint, and in default of appointment, to her own right Heirs, this is a power reserved to her, and she may execute the same[o].

But, a Feme Covert, cannot, it seems, bar her Heir by a *bare Agreement*, without doing any thing to alter the nature of the Estate[p]. "Suppose," says *Lord Hardwicke*, "a Woman having a real Estate before Marriage, in consideration of that Marriage, enters into an Agreement with her Husband, that she may by writing under her hand, executed in the presence of Witnesses, or by will, dispose of her real Estate, will

[n] Southby v. Stonehouse, 2 Ves. 610.

[o] See 2 Ves. 191. and see Travel v. Travel, 3 Atk. 711. Tomlinson v. Deighton, 1 P. Wms. 149.

[p] See Hodson against Lloyd, 2 Bro. C. C. 543,4. George v. —— Ambl. 628. but see Rippon v. Dawding, Ambl. 565. and Wright v. Englefield, Ambl. 468.

this bind the Heir at Law? It rests in Agreement, and if she does it, though it may bind her Husband from being Tenant by the curtesey, that arises from his own Agreement; but what is that to the Heir at Law? Still she is a Feme, under the disability of Coverture at the time of the act done; and if she attempts to make a Will the Instrument is invalid. The only question that could arise would be, whether such an Agreement between her and her Husband would not give her a right to come into a Court of Equity after the Marriage, to compel that Husband to carry this into Execution, and to join with her in a Fine to settle the Estate, either on such Trusts, or to such and such Uses? and if it is such an Agreement as the Court would decree to be farther carried into Execution by a proper Conveyance, then the question may be whether her Heir at Law is not to be bound by the consequences of that Agreement? but that is the only way in which it could be brought in. But if the Agreement cannot be carried into Execution, though she might have power to bar her Husband, it being a voluntary claim from her, and the Law casting the descent on her Heir at Law, it seems it could not be done[q]."

"If a Woman has a separate Estate in Land for Life, she may in Equity sell that Interest[r]."

[q] Per Hardwicke in Ld. Peacock v. Monk, 2 Ves. 191. and see Fettiplace v. Georges, 3 Bro. C. C. 10.

[r] Parkes and Whites, 11 Ves. 232. and see what is said in Burdon v. Dean, 2 Ves. jun. 608.

Having thus noticed Settlements to the separate use of a Feme Covert, it may be an excusable digression, to advert to the principles that have been laid down respecting such separate Estate,—the manner in which it may be created, otherwise than by Settlement, and the dominion which the Wife possesses over her separate Property; as well as to notice those Settlements, which Courts of Equity compel Persons to make, who apply to them for their assistance to obtain Property, in right of a Feme Covert. The Settlement which a Person clandestinely marrying an Infant Ward of Chancery, is compellable to make, has already been considered [z].

By *devise*, a married woman may acquire a separate Interest without the intervention of Trustees; and the legal Estate devolving on the Husband, he will be decreed to be a Trustee for the Wife [a]; though *Lord Cowper*, in the first case on the subject, appears to have expressed some doubts [b]. Nor are technical words necessary to make it a separate Trust, for if an Estate be devised to the Husband, "*for the livelihood of the Wife*," this has been held to make him a Trustee [c]. So, a Legacy to a feme Covert, "*her receipt to be a sufficient discharge to the Executors*," makes the Husband a Trustee for her [d]; and a present to the Wife by the Husband's Father, or even by a

[z] Ante, p. 280.

[a] Bennett v. Davis, 2 P. Wms. 316.

[b] Harvey v. Harvey, 1 P. Wms. 124. S. C. 2 Vern. 659.

[c] Darley v. Darley, 3 Atk. 399. but see the observations on this case, 3 Bro. C. C. 384.

[d] Lee against Prieaux, 3 Bro. C. C. 381.

Stranger, during the coverture, has been considered as a Gift to her *separate* use[e]. In general, however, it seems, that to prevent the operation of the marital right over the property of a married Woman, a clear intention that it shall be to her separate use must appear; and therefore a mere trust, to pay the Interest to her for Life, without saying to her separate use, is not sufficient: the mere intervention of Trustees never having had the effect of vesting a sole and separate Interest in the Wife[f].

A Personal Gift may be made to a Feme Covert without a power of disposition, or with a limited power[g]; but personal Property, unless tied up where it is enjoyed separately, will be so, with all its incidents[h]. It is a Rule, therefore, that a married Woman is to be considered as a Feme Sole, in respect of her separate Property[i]; except, perhaps, in regard to gifts or contracts, exclusively in favor of her Husband[k]; and as to

[e] Graham v. Londonderry, 3 Atk. 393.

[f] Lamb v. Milnes, 5 Ves. 517.

[g] Wagstaff and Smith. 9 Ves. 524. Hyde v. Price, 3 Ves. 437; and see More v. Huish, 5 Ves. 694.

[h] Fettiplace against Georges, 3 Bro. C. C. 10.

[i] Hulme v. Tenant, 1 Bro. C. C. 21. and the observations on that case in Nantes v. Corrack, 9 Ves. 188. Lillia v. Airey, 1 Ves. Jun. 278. Pybus v. Smith, 4 Bro. C. C. 346. Peacock v. Monk, 2 Ves. 190. Socket and Wray, 4 Bro. C. C. 486. S. C. in note to 2 Atk. 50. Heatley v. Thomas, 15 Ves. 596. Wagstaff and Smith, 9 Ves. 524. Wills and Dawkins, 12 Ves. 581.

[k] See Pybus v. Smith, 1 Ves. Jun. 189. S. C. 3 Bro. C. C. 347. Milnes v. Busk, 2 Ves. Jun. 498. Dalbiac v. Dalbiac, 16 Ves. 123. Richards v. Chambers, 10 Ves. 580. Lee v. Muggeridge, 18 Ves. 108. Sed

contracts with the Trustee of her separate Estate; who is not allowed to deal with her[l].

She may convey away her separate Estate, her Life Interest in Stock, for instance[m]; nor is it necessary the Trustee should join in the conveyance[n], unless his assent is expressly rendered necessary by the Instrument giving her that property[o]. The Court will never encourage the locking up of Property, which would be the case, if separate property could not be disposed of[p]. She may grant an Annuity out of her separate property[q], or enter into a Note, Bond[r], Contract[s], or Agreement, as if she were a feme sole[t]; and a Court of Equity will decree a satisfaction by the Trustees, out of her Property[v].

She may make a Contract, of which her Husband and herself enjoy the benefit[w], and may dispose of her separate property by Will[x].

If a Feme Covert living from her Husband, and having a separate maintenance, contracts debts,

Vid. Pawlet v. Delaval, 1 Ves. 518. 2 Ves. 670. Ellis v. Atkinson, 3 Bro. 565.

[l] Dalbiac v. Dalbiac, 16 Ves. 123.

[m] Chesslyn v. Smith, 8 Ves. 183.

[n] 1 Ves. 518.

[o] Pybus v. Smith, 1 Ves. Jun. 193,4. Essex v. Atkins, 14 Ves. 547.

[p] Stamford v. Marshall, 2 Atk. 69.

[q] See Essex v. Atkins, 14 Ves. 542. overruling Mores v. Huish, 5 Ves. 693.

[r] 2 Ves. 193. Norton v. Turville, 2 P. Wms. 144. approved in Sockett and Wray, in note to 2 Atk. 58.

[s] 2 P. Wms. 144.

[t] Master v. Fuller, 1 Ves. Jun. 513. S. C. 4 Bro. C. C. 19.

[v] Bullpin v. Clarke, 17 Ves. 365.

[w] Masters v. Fuller, 4 Bro. C. C. 19. S. C. 1 Ves. Jun. 513. 2 Atk. 380. Stamford v. Marshall, 2 Atk. 69.

[x] Fettiplace against Georges, 3 Bro. C. C. 8. S. C. 1 Ves.

the Creditors, by a Bill in Equity, may follow the separate maintenance, whilst it continues; but when that is determined, and the Husband dead, they cannot, by Bill, charge the Wife's *Jointure*[y].

Where Money was vested in Trustees in Trust for Husband and Wife, successively for Life, remainder to the Children, and in default thereof to such Person as the Wife should appoint, a deed of the Wife conveying this contingent Interest, was, upon a Bill filed for that purpose, established, and the consent of the Wife taken in Court[z].

It is observable that, in all these cases, illustrative of the absolute power of a *Feme Covert* over her separate Property, no *Examination* in Court is necessary; as it is, where she is parting with an Equity[a]. The Wife cannot by *examination* in Court, exercise any greater or other power over her settled Property than is reserved to her by the Settlement[b]. The contrary doc-

Jun. 46. Wagstaff and Smith, 9 Ves. 521; and see Rich and Cockell, in 9 Ves. 375. Heatley v. Thomas, 15 Ves. 596. If a feme covert has a power of appointment by will with witnesses, in order prove a due execution of her power, there must be the judgment of the Ecclesiastical Court, that the instrument is testamentary; and proof in the Court of Chancery, by the Witnesses to the instrument, Rich v. Cockell, 9 Ves. 376. or if in the execution of the power, witnesses were not required to the Will, yet in addition to the Proceedings in the Ecclesiastical Court, there must be proof of her signing the Will.

[y] Kinge v. Delaval, 1 Vern. 326.

[z] Guise v. Small, 1 Anstr. 277.

[a] See Sturgis v. Corp, 13 Ves. 192; and see Fraser and Baillie, 1 Bro. C. C. 518.

[b] Richards v. Chambers, 10 Ves. 585.

trine in *M^c^Cormic and Buller*, has been overruled[z].

In those cases where an Examination in Court of the Wife is necessary, the Property does not pass by force of the Examination, or the intervention of the Court; but the Equity, by the consent of the Wife, being put out of the way, the Court makes its Decree.

It is observable, however, that where the separate Estate is to be disposed of by the Feme Covert only in a particular manner prescribed by the Instrument giving the Estate, a Feme Covert cannot charge her separate Estate, not even by consent in Court[a], unless it be done, *eo modo*, as prescribed by the Instrument, creating the separate Estate[b]. So far as the Instrument creating her separate Estate makes her a Proprietor, so far is she a *feme Sole;* and if she has pledged her Estate according to her power, the Trustees must hold it to the uses she appoints[c]. If the Trust is, to pay the Rents and Profits to her, upon an Instrument signed by her *since* the last payment, an Instrument signed *before* would not do[d]. If, therefore, as in *Pybus and Smith*[e], and other cases, the Wife has only a power of disposing of separate Pro-

[z] Stated 8 Ves. 174. in Sterling and Rochefort, and in Richards v. Chambers, 10 Ves. 583.; and see what is said to same effect in Woollands v. Crowcher, 12 Ves. 178.

[a] Lord Strange against Smith, Ambl. 264.

[b] Jones and Harris, 9 Ves. 497. see also Essex v. Atkins, 14 Ves. 546.

[c] Pybus v. Smith, 1 Ves. jun. 194.

[d] Ib. 193.

[e] Ib. 180.

perty by an *Instrument in Writing*, and she executes an Instrument in Writing, that will bind her separate Property ; but where the Trust was, *to pay the money into the hands of the Feme Covert, and take a Receipt from her*, in such case the Trustees, it was held, were not justified in joining with the Wife and selling the Property.

In one case where a Legacy was given to the Wife *for her separate* use during her Life, with remainder to such person, and for such uses as she should appoint *by Will*, and in default of appointment to her *Executors*, it was ordered upon her consent to be paid to her Husband [f]; but this case has been subsequently overruled, and the power of disposition confined to a disposition by *Will* only [g].

Where a Feme Covert granted an Annuity charged upon her separate Property, and the Annuity, owing to the fault of the Grantee, failed, it was held that the separate Estate was not liable for the *Consideration* money, and that there was no Equity specifically to affect the Fund [h].

By marriage, the Husband acquires an absolute property in all the personal Estate of his Wife capable of immediate and tangible possession, and if he marries without a Settlement, there is, as to such

[f] Newman v. Cartony, mentioned in note 1. Willats v. Cay, 2 Atk. 68.

[g] Socket v. Wray, mentioned in note 1. to Willats v. Cay, 2 Atk. 68. S. C. 4 Bro. C. C. 486.

[h] Jones and Harris, 9 Ves. 494. See also Williams and Duke of Bolton, 2 Ves. 138. Sterling and Rochford, 8 Ves. 164. See also Sockett and Wray, 4 Bro. 483.

Property, no Equity to afford her relief[i]; but, if her Property is such as can only be reduced into possession by Action at Law or Suit in Equity, he has only a qualified Interest, such as will enable him to make it an absolute Interest by reducing it into possession; and with regard to *choses in Action*, if he does not reduce them into Possession, they will survive to the wife.

What Interests survive to the Wife in Equity, is determined, in general, by Analogy to the Rules of Law[k]. As at Law her *Choses in Action*, not reduced into Possession by the husband, survive to her, so do her equitable Interests in the same case survive to her in Equity. But there are some legal Interests which do not admit or stand in need of being reduced into possession; being in possession already and not lying in Action; as Terms for years and other Chattels Real, of which the legal Title is in the wife. They will survive if no act is done by him; but he may assign them and thereby pass the legal Interest[l], whether with or without consideration. The Analogy is followed in Equity. Equitable Interests of the same description may be transferred in the same manner. With respect to *Choses in Action*, they are not assignable at Law; consequently

[i] See Incledon v. Northcote, 3 Atk. 435:

[k] Mitford v. Mitford, 9 Ves. 99. &c. &c.

[l] So he may forfeit the Lease or it may be taken in Execution for his debts, but it does not survive. Wildman v. Wildman, 9 Ves. 177.

the Husband's Assignment cannot prevent their legally surviving to the Wife. In strict Analogy, therefore, equitable Interests of the nature of *Choses in Action* ought not to be affected by his Assignment. But in Equity, a distinction seems to have been made between a *voluntary* Assignment, and an Assignment for *valuable Consideration;* for the Wife surviving is not bound by his voluntary Assignment[m], though she is bound by an Assignment for a valuable consideration[n].

Where a Husband had assigned *part* of his Wife's equitable Interest, viz. Dividends of Stock in Trust, for a valuable consideration, the Assignment was enforced, upon the Bill of a Surety for the Husband to be indemnified against past and future payments; the Assignment extending only to £100 a year out of £260[o]; but, it seems, if the Husband had charged the Fund to its whole amount, or to any greater extent than he did charge it, the decision would have been different[p].

The general Assignment in Bankruptcy has not the effect of reducing into Possession a Legacy of Stock, in Trust for the Bankrupt's Wife; and she by surviving, becomes entitled[q].

And so, Stock transferred into the name of a married Woman, as next of Kin of an Intestate,

[m] Burnet v. Kennaston, 2 Vern. 401.

[n] Bates v. Dandy, 2 Atk. 207. Lord Carteret v. Paschal, 3 P. Wms. 197.

[o] Wright v. Morley, 11 Ves. 12. On this subject, see Franco v. Franco, 4 Ves. 515.

[p] 11 Ves. 22.

[q] Mitford v. Mitford, 9 Ves. 87.

upon the death of her Husband without having done any Act with reference to it, except signing partial transfers by her, survives to her[r].

A *Possibility* of the Wife may be assigned for a *valuable* consideration [s].

Where the Husband's claim to his Wife's Property must be asserted by Suit in Equity, as where the Property is vested in Trustees, who have the legal right, he cannot reach it without joining her with him in the Suit; and in such case, the Court will make him, thus seeking for Equity, do Equity, and provide for her, unless she consents to give the Property to him [t]. If, for instance, a Feme Sole Mortgagee marries, and the Husband files a Bill of Foreclosure, the Court will not compel the Mortgagor to pay the Money to the Husband, without his making some provision for his Wife; or at least the Wife by an Application to the Court against the Husband and the Mortgagor, may prevent the payment of the money to the Husband, unless some Provision were made for her [u].

In all cases, indeed, where the Wife has a demand in her own right, and the Husband applies to the Court in her right, and there is no Agreement previous to the marriage [v], it is an established Rule (of doubtful policy per-

[r] Wildman v. Wildman, 9 Ves. 174.

[s] Bates v. Dandy, 2 Atk. 207. Hawkins v. Obyn, 2 Atk. 549.

[t] See Langham v. Nenny, 3 Ves. 469. See Milner v. Colmer, 2 P. Wms. 639.

[u] Bosville v. Brander, 2 P. Wms. 459.

[v] See Brett v. Fercer, 3 Atk. 40.

haps [w]) that the Husband will not be allowed to obtain his Wife's fortune (unless it be under £100 [x], or unless, perhaps, where the Property is small, and the Husband is a *Freeman* of London [y]) without making a Provision for her; nor does an inadequate Provision for her by *voluntary* Settlement after marriage vary the Rule [z]. If the Wife is dead, and a Legacy is claimed by her Husband in her right, an inquiry will be directed whether the Issue are provided for [a]; and this Equity is considered as founded on natural Justice. The doctrine is not modern; it is adverted to in a very early case, by the *Lord Keeper Coventry* [b].

The Rule applies not merely to the Husband, but to Persons claiming through him, whether by operation of Law, or otherwise; on the Bankruptcy, for instance, of the Husband, it applies to his Assignees. The Assignees of a Bankrupt take, as the Husband would have done, subject to the *Equitable Interest* of the Wife, and are bound to make a proper Settlement [c]. In one case, *half the property* was given to the Wife [d]. A Settlement

[w] Brown and Elton, 3 P. Wms. 205. 2 P. Wms. 639.

[x] 3 Bro. C. C. 237.

[y] See Adams and Pierce, 3 P. Wms. 13. Sed que. as to this, since the stat. 11 Geo. I. c. 18. which gives Freemen a Power of bequeathing their Personal Estates.

[z] 2 Atk. 448.

[a] 1 Dick. 391.

[b] Tanfield v. Davenport, Tothill, p. 114.

[c] Jacobson v. Williams, 2 P. Wms. 382. Exparte Colygame, 1 Atk. 192. Grey v. Kentish, 1 Atk. 280. Worsal v. Marr, 2 Dick. 647. Mitford v. Mitford, 9 Ves. 87. Wright v. Morley, 11 Ves. 101. Lamb v. Milnes, 5 Ves. 517. Freeman v. Parsley, 3 Ves. 424. Osmell v. Probert, 2 Ves. 680. Pringle and Hodgson, 3 Ves. 617.

[d] Browne v. Clarke, 1 Ves. 168.

before marriage, of part of her Property to her separate use, does not bar her of this Equity [e].

So, too, the Rule, it seems, applies against a voluntary Assignee of the Husband [f], and even against a Purchaser for a valuable consideration of the Wife's interest from the Husband [g]; except, perhaps, in the case of a *Trust of a Term for years*, of Land, as to which *Lord Nottingham* [h] expressed great surprize, and others have entertained doubts [i].

The point, whether the Equity of the Wife can be barred or affected by the Husband's Assignment for a valuable consideration, was once, much questioned. *Lord Alvanley* admitted, that *Lord Hardwicke* and *Lord Thurlow* [k] intimated difficulties whether an Assignment for a *valuable consideration* might not support the right of the Assignee, or at least evade this Equity; but he observed, "*I have looked into almost every case; and have never seen it determined, that any such Equity does exist in favor of the Assignee* [l]."

Sir William Grant seems to have thought there were some cases very difficult to reconcile with

[e] Burdon v. Dean, 2 Ves. jun. 607.

[f] Jewson v. Moulson, 2 Atk. 420.

[g] Macauley v. Phillips, 4 Ves. 19. and see Wright and Rutter, 2 Ves. 711.

[h] See Pitt v. Hunt, 1 Vern. 18.

[i] 4 Ves. 19; Sir Edward Turner's Case, 1 Vern. 7. Tudor and Samyne, 2 Vern. 270. and see Jewson v. Moulson, 2 Atk. 420.

[k] See what Lord Thurlow said in Worrel v. Marlar, and Bushan v. Pell, mentioned, 1 P. Wms. 459. in note.

[l] Like v. Beresford, 3 Ves. 511, 512. and see Pope v. Crashaw, 4 Bro. C. C. 326.

Lord Alvanley's proposition ; for that there was hardly any other ground upon which *Lord Hardwicke*[m] proceeded, in some of the cases before him[n]. But, whatever doctrine formerly existed, it is now clear, that an Assignment of *all* the Wife's Property, though for a valuable consideration, would not avail[o], even in favor of Creditors[p], so as to deprive the Wife of her Equity.

If the Father of the Wife covenants to pay a sum of £1000 to the Husband, this is no part of the Wife's Estate, and may be obtained without a Settlement[q].

Whenever the Husband can come at the Estate of the Wife without the aid of a Court of Equity, the Court cannot interfere[r]. He may dispose of the Trust of a Term which he has in right of his wife, as well as of the legal Estate of a Term which he has in her right, without making a Settlement[s]. So also, if the Wife's Debtor pay her debt to the Husband[t]; or if, before a Bill is filed, a Trustee who has the Wife's Property, real or personal, chuses to pay the Rents and Profits of the real, or hand over the personal Estate to the Husband, (an improper Act on

[m] See Grey and Kentish, 1 Atk. 280. but said to be "arrant nonsense" as reported, 1 Dick. 494. Bates v. Dandy, 2 Atk. 208. and see Lord Carteret v. Paschall, 3 P. Wms. 199. before Lord King.

[n] Wright v. Morley, 11 Ves. 17. S. C. MS.

[o] Like v. Beresford, 3 Ves. 506.

[p] Prior v. Hill, 4 Bro. C. C. 139.

[q] Brett v. Forcer, 3 Atk. 405.

[r] See Attorney General v. Whorewood, 1 Ves. 539.

[s] Tudor v. Samyne, 2 Vern. 270.

[t] Mitford v. Mitford, 9 Ves. 100, 101. Jewson v. Moulson, 3 Atk. 419.

his part[a],) the Wife has no remedy; but, *after a Bill filed*, such Trustee cannot exercise a discretion; for the Bill makes the Court a Trustee, and takes away his right of dealing with the Property, as he had it previously[b]. The Husband, it seems, may transfer Bank Stock, belonging to his Wife, and the Bank cannot prevent it, nor can a Court of Equity, in such case, interfere to procure a provision for her[c].

The equitable Right which a married Woman has, in a Court of Equity, to a provision out of her own Fortune, before her Husband reduces it into Possession, stands upon the peculiar doctrine of such Courts. The habit of the Court has always been of itself, and without any application previously made by the married Woman, to direct an Inquiry, where Money has been carried over to her Account, whether any Settlement has been made, adequate to the Fortune she then possessed[d]; for the Money is carried over, subject to that Inquiry; and the constant course has been to direct a Settlement, not upon the Wife only, but *upon the Children also.* She is not permitted to say she claims a Settlement for herself and not for her Children[e]. She has the option not to have any Settlement made, but if a Settlement is to be made, it is always directed

[a] See Lord Elibank v. Montolieu, 5 Ves. 743.

[b] Murray v. Lord Elibank, 10 Ves. 90. and see Glaister v. Hewer, 8 Ves. 206. Macauley v. Philips, 4 Ves. p. 18.

[c] Wildman v. Wildman, 9 Ves. 176. and see Pringle v. Hodgson, 3 Ves. 620.

[d] Lady Elibank v. Montolieu, 5 Ves. 743,4. March v. Head, 3 Atk. 721.

[e] Murray v. Lord Elibank, 13 Ves. 6.

for the benefit of the Wife and Children[f]. She may upon examination apart from her Husband, and with full knowledge of her right, the same being ascertained[g], waive a Settlement[h], even in favor of a Husband who is Insolvent[i], and she can do it in that way only[k]: an Agreement out of Court, even where the Wife lives apart from her Husband, is insufficient[l].

It seems doubtful whether Children have any substantive and independent right to claim a Settlement, out of the property of their Mother, if a Settlement was not directed during her Life[m]. *Lord Hardwicke* seems to have thought they had such a right[n]; but in a subsequent case he held a different doctrine[o]. *Sir Thomas Clarke* considered the Children as having a right; but his Decree was afterwards reversed by *Lord Northington*[p]; and clearly, if there has been a decree directing a Settlement on the Wife and Children, and she does nothing to waive the Equity, (for in this stage she may waive it as to *herself*, but not, perhaps, as to

[f] Murray v. Lord Elibank, 13 Ves. 6, 7.

[g] Sterling v. Rochfort, 8 Ves. 164. Woollands v. Croucher, 12 Ves. 178. Edmonds v. Townshend, 1 Anstr. 98.

[h] See Wright v Rutter, 2 Ves. 677. Dimmock against Atkinson, 3 Bro. C. C. 195.

[i] Willats v. Cay, 2 Atk. 67. but see ex parte Higham, 2 Ves. 579.

[k] Macaulay v. Phillips, 4 Ves. 18.

[l] Macaulay v. Phillips, 4 Ves. 15.

[m] Murray against Lord Elibank, 13 Ves. 7.

[n] Grosvenor v. Lane, 2 Atk. 180, and see 2 Ves. 672.

[o] Hearle v. Greenbank, 3 Atk. 717.

[p] Scriven against Tapley, Ambl. 509. see also Cockel v. Phips, 1 Dick. 391. These cases are noticed by Sir William Grant, in Murray and Lord Elibank, 13 Ves. 7.

her Children [q],) and she dies before the Report, the Children are entitled [r]. So, if after a Proposal of a Settlement by the Husband, he dies, the Children would have a right to have it carried into execution [s]. There is no instance of a *Debtor* calling upon the Court to interpose an Equity for the Wife [t].

A Consent by the Wife, *de bene esse*, on a Bill for that purpose, may be taken for the sale of the Wife's *reversionary contingent Interest* in Stock [u]; for, it seems, unless such Consent is obtained, the Wife might, at a future day, set aside the Contract.

In all these cases where a Settlement is made, the Husband is considered as entitled to the Income of his Wife's Equitable Interest, unless he has received some Fortune with her, or has misbehaved [v], as by running away with a Ward of the Court [w], or is separated from his Wife [x], or leaves her unprovided for [y], or has become a Bankrupt [z], or makes a general assignment for the benefit of his Creditors [a].

[q] See 2 Ves. 672.

[r] Murray v. Lord Elibank, 13 Ves. 1. S. C. 10 Ves. 84. on demurrer; and see Macauley v. Phillips, 4 Ves. 19, 20. and also Becket and Becket, 1 Dick. 343. Rowe v. Jackson, 2 Dick. 604.

[s] Anon. 2 Ves. 672.

[t] Glaister v. Hewer, 8 Ves. 206.

[u] Woollands v. Crowcher, 12 Ves. 174, overturning the Argument of Mr. Madocks in Saddington and Kinsman, 1 Bro. C. C. 47.

[v] Macaulay v. Phillips, 4 Ves. 15. See Bond v. Simmons, 3 Atk. 20.

[w] See Like v. Beresford, 3 Ves. 506.

[x] Ball and Montgomery, 4 Bro. C. C. 339. S. C. 2 Ves. jun. 191.

[y] Sleech v. Thorington, 2 Ves. 562.

[z] Wiseman v. Mason, 1 P. Wms. 459. in note.

[a] Prior v. Hill, 4 Ves. 138.

If a Husband who has received the greatest Part of his Wife's Portion, (it would be otherwise it seems, if he had received no part of her Portion [b],) refuses to make a Settlement out of the small Remainder of her Portion, the Fund will be ordered to be paid into Court, and he will be prevented from receiving the Interest of such residue, unless he is starving [c].

And the Court will prevent a Husband taking the interest of money in Court, the Property of the Wife, upon the Wife's Affidavit of ill treatment; and will order it to be paid into Court [d], and in case of *Desertion* will order her a Provision [e]; and where the Husband goes Abroad, and has assigned part of the Dividends of Stock belonging to his Wife, without making any Provision for her, the remaining Dividends will be ordered to be paid to her [f], or till he thinks proper to return and maintain her [g].

But the Court will not interfere if the Wife refuses to live with her Husband [h]; and where there had been a Divorce for adultery by the Wife, the Chancellor refused to order Money settled to her separate use, to be paid either to the Wife or the Husband [i]; and in such case, Trus-

[b] See 2 Ves. 562.

[c] Bond v. Simmons, 3 Atk. 21.

[d] Alexander v. M'Cullock, cited in Ball and Montgomery, 2 Ves. jun. 191. and alluded to in De Mannville and De Mannville, 10 Ves. 56.

[e] Allerton v. Knowel, mentioned 4 Ves. 799. and see Oxenden v. Oxenden, 2 Vern. 494.

[f] Wright v. Morley, 11 Ves. 12.

[g] Watkyns v. Watkyns, 2 Atk. 97.

[h] Bullock v. Menzies, 4 Ves. 798.

[i] Carr v. Eastabrooke, 4 Ves. 146.

tees will, if necessary, be restrained from proceeding at Law to recover her separate maintenance[k]. So, if the wife *elopes*, the Court will not assist her in recovering Property settled to her separate Use[l].

If an annual Sum be secured for the Wife's Pin Money for her Apparel and Expences, and the Husband and Wife cohabit together, and the Husband maintains her, the Arrears of Pin Money are not recoverable[m] beyond the Year[n]; for in such case she is supposed to have been satisfied; but if the Wife lives separate and has no allowance, an account of the Arrears of Pin Money will be decreed[o].

If a Feme Covert has *Pin Money* secured by a Term, and runs away and lives in adultery, and the Trustees proceed at Law, to recover the Term, it seems they may be restrained; but if she left her Husband on account of ill usage, or other reasonable grounds, or the Husband acquiesced in her departure, Equity will not interpose[p].

To resume the consideration of Trusts raised by Settlements, we may next consider, the creation of *Trustees to support contingent Remainders.*

These Trusts arose out of the doctrine in *Chudleigh's* Case[q], and in *Archer's* Case[r], but they

[k] Moore v. Moore, 1 Atk. 276.

[l] Lee v. Lee, 1 Dick. 321. and 2 Dick. 806. Mildmay v. Mildmay, 1 Vern. 53.

[m] Thomas v. Bennet, 2 P. Wms. 341. and see Fowler v. Fowler, 3 P. Wms. 353.

[n] See 2 Ves. 190.

[o] Aston v. Aston, 1 Ves. 267.

[p] Sir R. More and Earl of Scarborough, 2 Eq. Abr. 156.

[q] 1 Co. 120.

[r] 1 Co. 66.

were not put in practice till the time of the Usurpation [s], when *Sir Francis Moore* first made use of them. *Duncombe and Duncombe* [t], appears to have been the first case, in which such a limitation to Trustees came in question [u].

Where an Estate [v] is limited to A. for life, remainder to his first, &c. Sons in tail, though it be a plain wrong and tort in him to do any act which will destroy those contingent remainders, ("a most barbarous thing," *Lord Talbot* calls it [w],) before the birth of a Son, notwithstanding his legal power of doing so, yet as in this case there is no Trustee, there can be no trust, nor consequently any breach of trust, and therefore a Court of Equity may have no cognizance of such a case, nor handle for relief, the matter being left purely to the Common Law. Whether a Tenant for Life, of an Equitable Estate, can destroy Contingent Remainders, has been doubted [y].

To prevent this inconvenience, the appointment of Trustees was invented, on purpose to disable the Tenant for Life from doing such injury to his issue.

If, therefore, before the birth of a Son, a mere Trustee to preserve contingent Remainders, (it would be different if he were Tenant for Life, as well as Trustee [x],) whether appointed under a

[s] Garth v. Cotton, 1 Ves. 555.

[t] 3 Lev. 437.

[u] Garth v. Cotton, 1 Ves. 555.

[v] Mansell and Mansell, 2 P. Wms. 681. S. C. MS. Pye v. George; Salk. 680. Garth and Cotton, 3 Atk. 754. These cases overrule what is said in Duke of Norfolk's case, Polexf. 250.

[w] For. 239.

[x] Osbrey v. Bury, 1 Ball and Beatty, 58.

[y] Hopkins v. Hopkins, Mich. 892. 1733. MS. S. C. 1 Atk. 589.

voluntary Settlement, or for a valuable consideration, or by Will[y], joins in barring such Remainders, it is a breach trust, and he is answerable to a Son afterward coming into existence; and so is a Purchaser with notice[z], or a Person taking by voluntary Conveyance[a]; but, it seems, that only the first Son, and not second and other Sons, have this shield thrown over their Interest[b], though a difference has been made, where the limitation is by *Settlement*, and where by *Will;* as in the latter case, all Persons are *Volunteers*[c].

Where Trustees to preserve Contingent Remainders are called upon to join for the purpose of a new Settlement, upon the Marriage of the eldest Son, making the Tenant in Tail Tenant for Life, and continuing instead of destroying, the object of the Settlement; in such cases, it has been said, the Court will compel them to join[d]: and also in some cases, though not for that purpose, but under some particular distress, or other special circumstances[e]; but, generally, in all other cases, and where instead of the ordinary limitation to a Tenant for Life, it is to the Husband for a term of years, if he shall so long live, with remainder to Trustees during his life, to preserve

[y] Mansel v. Mansel, 2 P. Wms. 678. S. C. MS. Symance v. Tattam, 1 Atk. 614.

[z] Mansell and Mansell, For. 253. S. C. MS. Moody v. Walters, 16 Ves. 303, 307. Pye v. Gorge, 1 P. Wms. 128. Biscoe v. Perkins, 1 Ves. and Bea. 491.

[a] Ib. 129. Mansell and Mansell, 2 P. Wms. 680. and MS.

[b] Walter and Moody, 16 Ves. 304. but see ib. 305, and Topping and Piggot, 1 Eq. Ca. Abr. 385.

[c] See Barnard and Large, 1 Bro. C. C. 535.

[d] As in Winnington v. Foley, 1 P. Wms. 536; and see Symance v. Tattam, 1 Atk. 613. Sed Vid. Biscoe v. Perkins, 1 Ves. and Bea. 492.

[e] See Barnard and Large, Ambl. 77.

Contingent Remainders, the Court will leave it to the discretion of the Trustees [f]. If the Trustees improperly use their discretion, or refuse to exercise it upon a proper occasion, the Court, it has been said, will interfere [g].

And where the Court has, at the instance of an eldest Son, ordered Trustees to join in the destruction of Contingent Remainders, it has sometimes imposed conditions upon the Son, as that he should make a Provision for a Sister [h].

Trustees in a *Voluntary Settlement* have, upon the Bill of Creditors, claiming under a subsequent conveyance in trust for the payment of debts, been decreed to join in destroying the contingent Remainders [i]. And such Trustees, (there being no Issue) have been decreed to join in a Sale, where the Settlement was only of an Equity of Redemption, and the Wife consented to the Sale [k].

It has been said, that Trustees ought never to join in the destruction of contingent Remainders without the direction of the Court [l]; but it seems, that as the Court only decrees the Trustees to do, *what they ought to do*, it is not necessary for Trustees, in clear cases, to apply to the

[f] See Woodhouse v. Hoskins, 3 Atk. 24. see Argo. Moody v. Walters, 16 Ves. 291. Fearne on Remainders, 331. fifth edit. and the cases there cited.

[g] Barnard and Large, 1 Bro. Ch. Ca. 535. Moody v. Walters, 16 Ves. 307.

[h] Frewin and Charlton, 1 Eq. Abr. 386. quot. 16 Ves. 304.

[i] Basset v. Clapham, 1 P. Wms. 358. quot. 16 Ves. 305.

[k] Platt v. Sprigg, 2 Vern. 303.

[l] See Fearne on Contingent Remainders, p. 336. and Mr. Cox's note to Basset v. Clapham, 1 P. Wms. p. 358.

Court[m]; and that the absence of that sanction, will not render the act, a breach of trust. The doctrine on this subject is, however, involved in difficulties; so much so, that as great a Judge as ever existed, has said, upon a review of the cases, as to the duties and liabilities of Trustees, "The task of deducing from them what is the true principle, is greater than I have abilities well to execute. The cases," says he, "are uniform to this extent; that if Trustees, before the first Tenant in Tail is of age, join in destroying the remainders, they are liable for a breach of Trust; and so is every Purchaser under them with notice: but when we come to the situation of Trustees to preserve Remainders, who have joined in a Recovery after the first Tenant of Tail is of age, it is difficult to say more than that no Judge in Equity has gone the length of holding that he would punish them as for a breach of Trust, even in a case, where they would not have been directed to join. The result is, that they seem to have laid down, as the *safest* rule for Trustees, but certainly most inconvenient for the general Interests of Mankind, that it is better for Trustees never to destroy the Remainders, even if the Tenant in Tail of age concurs, without the direction of the Court[n]."

Trustees created by express limitation, for the purpose of preserving contingent Estates, are guilty of a neglect of their duty, if they permit the Tenant for Life, liable to impeachment for Waste,

[m] See Moody and Walters, 16 Ves. 310. Woodhouse v. Hopkins, 3 Atk. 24.

[n] Lord Eldon, in Biscoe v. Perkins, 1 Ves. and Bea. 491.

or a Tenant *pur autre vie*, who by the nature of his Estate is liable for Waste, to destroy Timber[o]. Neither ought Trustees to preserve contingent Remainders to permit the Tenant for Life or years, by the destruction of his Estate to bring forward a Remainder to himself or another, for the purpose of cutting Timber[p]. In the case of Copyholds, the Lord's Estate will preserve contingent Remainders, without any express nomination of Trustees for that purpose[q]; but *Lord Eldon* seems to doubt, whether it is his duty to interpose actively, to prevent Waste[r].

Trust Terms for the raising of Portions, are also usual in Settlements.

Where Portions are thus to be raised, and there is also a Covenant by the Settler to pay them, the real Estate is considered as the *primary Fund*, and the personal Estate of the Covenantor as *auxiliary* only[s]. It is the same, though the Covenant be to settle absolutely within six months, and it is broken, so that damages might be recovered, for still the party must first resort to the Land, and only in case of a deficiency, call upon the personal Estate[b]. If there be a Covenant to settle Lands, and to raise a term of years out of them for securing a Portion, but no Covenant for the payment of the Portion, and only a Bond for per-

[o] Stansfield and Habergham, 10 Ves. 283.

[p] Garth and Cotton, 1 Dick. 183. 3 Atk. 751. 1 Ves. 524, 546. Stansfield and Habergham, 10 Ves. 279.

[q] See Garth and Cotton, ib.

[r] 10 Ves. 282.

[s] Lechmere v. Charlton, 15 Ves. 193.

[b] Edwards v. Freeman, 2 P. Wms. 438.

formance of Covenants, the Portion is not in any event payable out of the personal Estate [c].

Parents may make a Provision for children, which shall depend upon the condition of their surviving them [d]; but to do so, the intention must be very strongly expressed; for contrary to the obvious meaning of expression, it is a Rule, established by many decisions, that if Portions are directed to be paid at the age of twenty-one, or on the marriage of Daughters, with survivorship, followed by a Provision, that if they attain those periods in the life of the Father, the portions shall not be paid till after his death, (a clause originally framed to obviate the difficulty arising from the determinations that charged the reversion by permitting Interest to be carried on from the age of twenty-one, though there was an Estate for Life [e],) yet that clause will not prevent the *vesting* in the Life of the Father; [f] for in these cases, the Court looks upon it as a hard thing to impute to a Father that he should mean, a child having attained twenty-one, or come to marriageable years and formed a family, and because that Child dies in his Life, the descendants should have nothing; and feeling that not to be a probable intention in a

[c] Edwards v. Freeman, 2 P. Wms. 437. and see 1 P. Wms. 293.

[d] Woodcock against the Duke of Dorset, 3 Bro. C. C. 570. Powis v. Burdett, 9 Ves. 435.

[e] Willis v. Willis, 3 Bro. C. C. 54. and see Emperor v. Rolfe, 1 Ves, 208.

[f] Hope v. Clifden, 6 Ves. 499. Willis v. Willis, 3 Ves. 51. Powis v. Burdett, 9 Ves. 428. King v. Hake, 9 Ves. 438. Schenck v. Legh, 9 Ves. 300. Jefferies v. Renons, quot. 9 Ves. 311. Emperor v. Rolf, 1 Ves. 209.

Parent, the Court have thought themselves at liberty to manage the construction of the Words, as they would not in the *case of a Stranger*, or upon a matter *of contract*, without any mixture of parental feeling[g]. But where, in addition to the before-mentioned Proviso, there is a farther proviso for a limitation over in the event of no child living at the death of the Survivor of the Parents, or of the death of all, "before the fund should, so as aforesaid, be payable, &c." the gift, it seems, is contingent[h]. The raising or not raising of a Portion, depends upon the particular penning of the Trust, and the intention of the Instrument[i].

Lord Hardwicke expressed his unwillingness to raise portions, or interests upon them, out of *Reversionary Terms*, and refused so to raise them upon *construction* or *implication* only[k]. He laid it down also as a Rule, that if a term of years, or other Estate be limited to Trustees, for raising Portions for Daughters, payable at a certain time, which have become a vested Interest, they shall not stay till the death of the Father and Mother, unless some intention appears to postpone them; but if there does, the Court will always take notice of such intention, and postpone it accordingly; and the latter cases, as *Brome and Berkley*[l], and others, shew, the Court has laid hold of *very small grounds*,

[g] Hope v. Clifden, 6 Ves. 507.

[h] See Schenck v. Legh, 9 Ves. 300.

[i] Codrington v. Lord Foley, 6 Ves. 379.

[k] Lyon v. Chandos, 3 Atk. 417; and see Ravenhill v. Dansey, 2 P. Wms. 179.

[l] 2 P. Wms. 484.

that speak the intent of the Parties, to hinder the raising of Portions in the Life of the Father and Mother[m]. *Lord Eldon,* however, has observed, "The Court ought not to be eager to lay hold of circumstances. The Court," says he, "ought to hold an equal mind, while construing the Instrument; and I cannot agree with what is said in *Stanley* v. *Stanley*[n], that *very small grounds are sufficient.* If they are sufficient to denote the intention, they are not small grounds; if they are not sufficient to denote the intention, the Court does not act according to its duty, by treating them as sufficient; thereby disappointing the true intention of the Instrument[o]."

The first cases in which the Portion was ordered to be raised in the Life of the Parent were *Graves and Maddison*, and *Gerrard and Gerrard*[p], which were followed by some others; but in the case of *Corbet and Maidwell*[q], *Lord Cowper* made a stand, and said he would lay hold of any words, to prevent being bound by the former decisions[r]. *Lord Macclesfield* followed his example, and refused to go "*one jot farther*" than the preceding cases[s].

This doctrine has been followed, and Courts will lay hold of any words, from which it can be fairly inferred, that it was not the Intention to

[m] Stanley v. Stanley, 1 Atk. 549; and see Stevens v. Dethick, 3 Atk. 42.

[n] 1 Atk. 549.

[o] Ib. 389.

[p] 2 Vern. 458.

[q] 1 Salk. 159. 2 Vern. 685.

[r] See what Lord Hardwicke says in Stevens v. Dethick, 3 Atk. 41.

[s] Butler v. Duncombe, 1 P. Wms. 452. Keresby and Newland, 2 P. Wms. 99.

charge the Reversionary Term with raising Portions in that manner, for it is tearing an Estate to pieces, ruining the eldest Sons of families[t], and encourages undutifulness and improvident marriages[u]; if, therefore, upon the context of the Settlement any thing can be collected by which it may appear, that it could not be the intention of the Parties to raise them in that way, the Court is extremely eager to lay hold of it[v].

Where, therefore, the Portion was directed absolutely to be paid at the age of twenty-one or marriage, but maintenance was directed not to commence until the Estate of the Trustees should take effect in possession, the Court, on that account, refused to raise the Portion, by a Sale of the reversionary term[w].

Questions, however, of this sort, do not now often arise, for negative words are usually inserted in Settlements, to prevent Portions being raised in the Life-time of the Father and Mother, without their consent[x]; but where there are great Estates, it is common to direct that upon the death of the Father, the Portions for the Daughters shall

[t] See Reresby v. Newland, 2 P. Wms. 93.

[u] See the arguments of Lord Chancellor and Master of Rolls, in Brome v. Berkley, 2 P. Wms. 485. etc. and Hall v. Carter, 2 Atk. 355. Stevens v. Dethick, 3 Atk. 42. Reresby v. Newland, 2 P. Wms. 99. but see the observations in Smith against Evans, Ambl. 634. as to the prudence of these decisions.

[v] Clinton v. Seymour, 4 Ves. 460; and see Brome v. Berkley, 2 P. Wms. 484. see also Sandys v. Sandys, 1 P. Wms. 707.

[w] Brome v. Berkley, 2 P. Wms. 484. confirmed on appeal to the House of Lords, 3 Bro. P. C. 437.

[x] Hall v. Carter, 2 Atk. 355. Reresby v. Newland, 2 P. Wms. 99.

be raised in the Life-time of the Grand-father, so as not to suspend the raising of them till after two lives [y].

If there is nothing more than a limitation to the Parent for Life, with a term to raise Portions at the age of twenty-one, or marriage, and the Interests are vested, the contingencies having happened, at which the Portions are to be paid, the Interest is payable, and the Portions must be raised by Mortgage or Sale of the *reversionary Term;* the only manner in which they can be raised [z].

Where a Term is created for Daughters Portions, commencing after the death of the Father and Mother, upon Trust to raise the Portions, *from and after the commencement* of the Term, and the Father dies, leaving a daughter, the Portion becomes vested, but is not raiseable during the Life of the Mother [a].

Interest is payable on Portions, from the time they become due [b]; but so long as they remain liable to a contingency, Interest is not payable [c]: as where there is a power to raise Portions, and for the Husband with the consent of the Trustees, to revoke all the uses, this suspends the Portion,

[y] Lyon v. Chandos, 3 Atk. 418.

[z] Codrington v. Lord Foley, 6 Ves. 364. Stanley and Stanley, 1 Atk. 549. and see Sandys v. Sandys, 1 P. Wms. 707. Hebbletwait v. Cartright, For. 31. S. C. MS. under the name of Iblethwaite v. Cartwright.

[a] Butler and another v. Duncombe, 1 P. Wms. 448.

[b] Rolt v. Rolt, For. 189. Hall v. Carter, 4 Ves. 357. See Butler v. Duncombe, 1 P. Wms. 453. Lyon v. Chandos, 3 Atk. 416. but see the remark on that case in 4 Ves. 463.

[c] Reresby v. Newland, 2 P. Wms. 101. affirmed Dom. Proc. 2 Bro. C. C. 487.

and it may be revoked any time before it is raised and paid [d].

It has been said, there is no instance of mortgaging a Reversion for the payment of *maintenance* given by way of Portion [e]; but the Rule seems to be that, a Reversionary term raised for securing maintenance and Portions for Daughters shall, in cases of necessity, be mortgaged, to pay either, and when fallen into Possession shall pay all the arrears of maintenance incurred before it came into Possession [f].

When Portions are charged on Estates, *to pay in equal rates and portions*, it means to be paid *pro ratâ*, as to the value of the Estates [g].

There are two ways of raising Portions: one, by Sale or Mortgage; the other, by perception of Profits [a].

If a Portion be directed to be raised *by a given time*, out of the *Rents and Profits* of an Estate, unless *annual* Rents and Profits are mentioned [b], or distinctly appear as exclusively intended to satisfy the charge [c], the Land itself may be sold; but if no time for payment is appointed, a Sale will not be decreed [d], though the Portion be

[d] Ib.

[e] Pierpoint v. Lord Cheney, 1 P. Wms. 493. Sed Vid. what is said of this case, 4 Ves. 464.

[f] Ravenhill v. Dansey, 2 P. Wms. 179.

[g] Tate against Hilbert, 4 Bro. C. C. 286.

[a] Evelyn v. Evelyn, 2 P. Wms. 669.

[b] Trafford v. Ashton, 1 P. Wms. 415.

[c] Small v. Wing, 3 Bro. P. C. 503.

[d] Sheldon v. Dormer, 2 Vern. 310. Ivy v. Gilbert, Prec. Ch. 583. S. C. 2 P. Wms. 13. Green v. Belchier, 1 Atk. 506. Evelyn v. Evelyn, 2 P. Wms. 669. Ravenhill v.

vested, but must be raised out of the Rents and Profits[e]. Nor will a Sale be decreed, if there be a power of satisfying the charge by another mode; as if there be a power to *lease* or to *mortgage* the Premises[f]; for all Trusts of Terms directing the methods of raising Money, imply a negative, (viz.) that the Money should be raised by the methods prescribed and not otherwise[g].

But where a Term is limited to raise Portions by Rents and Profits, for younger children, the Heir, it seems, may insist on having the Portions raised by a Sale, though the younger children object[h].

Directing a gross sum to be raised by way of Portion, does not necessarily imply, that it shall be raised *at once*, for it may be raised out of the *Rents and Profits*, and so laid up till it amounts to that sum[i].

A Father will, in general, be presumed to have paid the debt he owes to a Daughter, when in his Life-time, he gives her in Marriage a greater sum than he owed her; for it is very unnatural to suppose that he would choose to leave himself a Debtor to her, and subject to an account.

If there be a power to charge Premises, with

Dansey, 2 P. Wms. 180. Okeden v. Okeden, 1 Atk. 551.

[e] 2 P. Wms. 671. Earl Rivers v. Earl Derby, 2 Vern. 72.

[f] Ivy v. Gilbert, 2 P. Wms. 13. mentioned also 2 P. Wms. 672. Mills v. Banks, 3 P. Wms. 1.

[g] Butler and Duncombe, 1 P. Wms. 448. Mills and Banks, 3 P. Wms. 7.

[h] Warburton v. Warburton, 2 Vern. 420.

[i] Okeden v. Okeden, 1 Atk. 551; and see Evelyn v. Evelyn, 2 P. Wms. 666.

Portions for younger children, *an eldest Daughter*, where there is a Son, or where the Estate by a Settlement goes all to a remainder-man, is considered in Equity, as a *younger Child*[k].

When a Father on the Marriage of a Daughter, gives her a Portion, and she agrees to take it in satisfaction of any demand she may afterwards have on his Estate, this will amount to a bar of any claim, she may afterwards have on the Father's Estate[l].

A *Portion* charged on real Estate, *carries Interest* at four per Cent.[m], from the time the Portion ought to be raised and paid, although Interest is not mentioned[n]; because it may be necessary that Interest should be given by way of Maintenance, for there may be no other[o].

But where there is a power to raise Portions for children, charged upon an Estate, that power necessarily imports, that from the time the Portion to be raised, is payable, or vested, it is also in the discretion of the Party, as a necessary consequence of it, to prescribe what rate of Interest shall be given, provided it does not exceed legal Interest[p]. The Court only interferes by giving four per Cent. where no rate is specified by him, who has a right to fix the Sum[q].

[k] Beale v. Beale, 1 P. Wms. 244.

[l] Morris v. Burroughs, 1 Atk. 402. Metcalfe v. Ives, 1 Atk. 64.

[m] Guillam v. Holland, 2 Atk. 343.

[n] Earl Pomfret v. Lord Windsor, 2 Ves. 487.

[o] Boycott v. Cotton, 1 Atk. 555.

[p] Lewis v. Freke, 2 Ves. Jun. 511; and see Boycott v. Cotton, 1 Atk. 552.

[q] Ib. 512.

In cases where Parties sleep upon their rights, and no compromise or discussion of their claims has taken place, and where the Defendant is ignorant thereof, and there is no disability on the one side, or Fraud on the other, Interest will not be given on a Portion, or an account directed of the Rents and Profits further back, than the filing of the Bill [r].

A Limitation over of a Portion in a Settlement, in case of death before a Portion shall become *payable*, does not prevent the *Interest* from vesting; and the same doctrine, it seems, extends to Portions, created by *Will*.

A Daughter's Portion secured by a Trust Term is not extinguished, by a Devise of the Lands, to the Daughter in Tail [s].

2. We proceed now to consider, *the Trusts usually raised by Deeds on Conveyances to Purchasers.* The Trust here alluded to, is the assignment of a Term to a Trustee with a view to prevent any right to Dower, attaching on the purchased Estate [t].

These Terms are, as Lord *Hardwicke* says, "mere creatures of Equity, partly to protect real Estates, and partly to keep them in the right channel [u]." All Terms of years created either by Will [v], or by Deed, as by way of *mortgage*, or for

[r] Barrington v. O'Brien, 1 Ball and Beatty, 180.

[s] Lawrence v. Blatchford, 2 Vern. 457.

[t] For the various modes of barring Dower, see Mr. Butler's notes to Co. Lit. 216 a. and 381. b.

[u] Willoughby v. Willoughby, Ambl. 28.

[v] As to will, see Wynch v. Packington, 2 Eq. Abr. 507.

securing the payment of *Jointures*, *Portions* for children, or, indeed, for any other purpose, do not determine (without a special provision for that purpose,) by the performance of the trusts for which they are raised, but continue to exist in the Termor, for the benefit of the owner of the Inheritance.

If, for instance, a Man seized in fee of Lands, grants a lease for a long term of years to Trustees, for payment of his debts, or for some other purpose, without providing that after his debts are paid, or purpose accomplished, the term shall cease, or attend the Inheritance, yet Courts of Equity hold that, after the debts are paid, or purpose accomplished, the term continues in the Lessee, and is, as its shadow, attendant on the Inheritance, whether declared by the original conveyance to attend the Inheritance or not.

In these cases, the legal Interest during the continuance of the term, is in the Termor; but the owner of the fee is, in Equity, entitled to all the benefit or advantage which can be made of the term during its continuance; nor is the Termor permitted to obstruct the Owner in any acts of ownership, or in making any assurance of his Estate. In these respects, therefore, the term accompanies the Inheritance. Nor can it be disannexed, (unless expressly and designedly severed[w],) in the consideration of a Court of Equity. By a

1 Bro. P. C. 372. and cited as authority in Hewitt against Wright, 1 Bro. 90.

[w] Hayter v. Rod, 1 P. Wms. 359.

Will, therefore, not executed according to the Statute of Frauds, the Term, (unless an intention to pass the term, is clearly expressed [x],) is not severed from the Inheritance, nor will it pass, as the Inheritance does not pass [y]. It follows the descent of the Inheritance to the Heir, and on the death of the Ancestor vests in the personal Representative of the Ancestor, for the Heir's benefit [z]; nor is ever severed in favor of an Heir or Executor, though there are cases where it has been done, in favor of *Creditors* [a].

It follows all the alienations made of the inheritance, or of any partial Estate or interest carved out of it by *Deed*, by *Will*, or by *act of Law* [b]. It is an excrescence of the Inheritance, and affected in the same manner as the Inheritance. It is real assets [c]; and is as against the Heir [d], or Assignees of a Bankrupt [e], subject to Dower [f].

The principal advantage derivable from these outstanding terms, consists in the *Security* they afford to *Purchasers*.

[x] See 9 Mod. 127. 2 Collect. Jurid. 276. quot. Sugd. Vend. and Purch. 362.

[y] Villiers v. Villiers, 2 Atk. 72. S. C. Barn. 307.

[z] 2 Vern. 139. Levit v. Needham.

[a] Cooke v. Cooke, 2 Atk. 67; and see Willoughby v. Willoughby, 1 D. and East, 766. Goodright v. Sales, 2 Wils. 331.

[b] Vid. Willoughby and Willoughby, 1 T. Rep. 763. Swannock and Lifford, Co. Lit. 290[b]. n. 1. s. 13. and Maundrell and Maundrell, 7 Ves. 567. and 10 Ves. 246. In these references will be found all the most important doctrine on this subject stated, or referred to.

[c] Attorney Gen. v. Sir G. Sandys, Hard. 489.

[d] Wray v. Williams, Prec. Ch. 151.

[e] Squire v. Compton, 9 Vin. Abr. 227. pl. 60.

[f] Dudley v. Dudley, Prec. Ch. 241. Williams v. Wray, 1 P. Wms. 137. Hill and Adams, 2 Atk. 209. Dormer and Fortescue, 3 Atk. 124.

For where a Person purchases an Estate, or takes a Mortgage[g], and obtains an assignment of an *outstanding term* to a Trustee, he is thereby secured against all Estate, Charges, and Incumbrances, (except Crown debts[h] by specialty[i],) upon the purchased Estate, created intermediately between the time of granting, or to speak technically, the *raising* of the Term and time of the purchase[k]; but a Purchaser to avail himself of the benefit of such outstanding Term, must have paid a *valuable consideration*;—for his purchase must have been fair;—he must have had *no notice*, either *express* or *implied*,—and have the *first* and *best right* to call for the legal Estate of the Term[l].

With regard, however, to *notice express* or *implied*, there is, in the case of a *Dowress*, one very notable exception to the generality of the doctrine before laid down; for though the Purchaser of an Estate has notice that the Individual of whom he purchased was married, and consequently that if the Wife survived her husband, a right to Dower would attach, yet if the outstanding term be assigned to a Trustee for the Purchaser, (it would be different if the

[g] See Evans v. Bicknell, 6 Ves. 184. Robinson v. Davison, 1 Bro. C. C. 63.

[h] Nicholls v. Howe and others, 2 Vern. 390. King v. Smith, mentioned in Sugd. on Vend. and Purch. 347. and Appendix of same Work, No. 15.

[i] King v. Smith, 1 Wight. 34.

[k] See Willoughby and Willoughby, 1 T. R. 768; and see also Basset v. Nosworthy, Finch Rep. 102. where the doctrine is well stated, and was approved by Lord Rosslyn in Jerrard and Saunders, 4 Bro. C. C. 457. Saunders v. Dehew, 2 Vern. 271.

[l] Ib.

term instead of being assigned were suffered to remain with the Vendor's Trustee), the Vendor's Wife cannot substantiate a claim of Dower[m]. But this is an anomalous case, not reconcileable with the ordinary principles of Equity, and the determination is vindicable only by the consideration, that such had long been the practice of conveyancers, and that a different decision would have shaken many titles[n].

Another use made of these outstanding terms is, where there are two Mortgages; for if the second Mortgagee has no notice of the first Mortgage, and can get in a satisfied term, he may protect himself[o].

If the Vendor of an Estate, conceals from the Purchaser, the existence of an outstanding term, a fine levied by the Vendor to the Purchaser with five years non-claim, will bar the Assignee of the term, and the Trust passes inclusively in the Fine; but if a Purchaser *knows* of an outstanding term, and it is agreed that the term should be assigned in Trust for the Purchaser, in such case, though the Vendor levies a fine to the Purchaser, the fine will operate on the *Inheritance only*, and

[m] See Wynn v. Williams, 5 Ves. 134. and Maundrell and Maundrell, 7 Ves. 507. and 10 Ves. 271. S. C. MS. The decision of Lord Somers on which this doctrine is grounded, was affirmed in the House of Lords, Lady Radnor v. Vandebendy, Show. P. C. 69. Prec. Ch. 65. 1 Eq. C. Abr. 219; and see Hill v. Adams, 2 Atk. 208. S. C. Ambl. 6. under title of Swannock v. Lyfford.

[n] See Lady Radnor v. Vandebendy, Prec. Ch. 65. Shower's Parl. Cases, p. 69.

[o] Vid. Evans and Bicknell, 6 Ves. 184. Robinson v. Davison, 1 Bro. C. C. 63.

not on the *term*[p]; such being the plain intent of the Parties[p].

Where terms are raised by Settlements for family purposes, it is usually provided, (always in well drawn deeds,) that if the Trusts never arise, or become unnecessary, or incapable of taking effect, or are performed, that the term shall cease; and in such events the term, of course, ceases, according to the express Provision of the Deed.

Another manner in which a term may cease is, by way of *Merger*. Thus, if a term of years, and the Inheritance meet, in one person, *in the same right*, the term becomes extinct[q]; but it is otherwise, where a term of years is held in *one right*, and the Inheritance in *another*[r], or where there is only an equitable Estate in the Inheritance, and a Legal Estate in the term, but the term attends the Inheritance; and in such case, residuary Legatees have no claim under the term against the Heir[s].

Although terms may have ceased, it is a prudent rule with conveyancers, to recommend, that nearly all terms for years, however ancient they may be, and whatever adverse possession, or fines there may have been, should be required by a Purchaser to be assigned to him, or to a Trustee

[p] Inham v. Morrice, Cro. Car. 109. Dighton v. Greenvil, 2 Vent. 329. See also Freeman v. Barnes, 1 Vent. 80. 1 Lev. 270. quot. in Sugden's "Law of Vendors and Purchasers," p. 330. last edition.

[q] See Cooke v. Cooke, 2 Atk. 67.

[r] 1 Inst. 338[b]. Gong and Radford, Hob. 3.

[s] Capel v. Girdler, 9 Ves. 509.

of the Purchaser's nomination, to attend the Inheritance [t].

It was once held, *at Law*, that a *satisfied* term should not be set up in Ejectment, and it was afterwards determined that where a term is satisfied, it may be put as a question to the Jury, whether an assignment may not be presumed [u]; but this doctrine has been much objected to as an innovation, and as injurious to the rights and benefits which previously accrued by means of outstanding Terms to Purchasers and Mortgagees [v], and is now wholly exploded [w]. But the reconveyance of the Legal Estate will, even in Equity, be presumed, after great lapse of time; 140 years, for instance [x].

3. With regard to *Mortgages*, it is a Rule in Equity, that a Mortgagee is only considered as a *Trustee* [y], and that a Mortgage, as in the Civil Law, is only a Security for the Money, and passes only a Chattel Interest, and does not alter the thing it conveys. Nothing real passes to the Mortgagee. It conveys nothing in the Land; neither *Dower*, or *Tenancy by the Curtesy* [z]. The *Equity of Redemption* is considered as an Estate in the Land, and may be devised [a], granted or

[t] See Sugden Vend. and Purch. 330.

[u] Vid Doe on dem. Bristowe v. Pegg, 1 T. R. 758. n. Doe on dem. Hodsden v. Staple, 2 T. Rep. 684. Doe on dem. Da Costa v. Wharton, 8 T. R. p. 2.

[v] Evans v. Bicknell, 6 Ves. 184, 5. Hillary v. Walter, 12 Ves. 251. Shannon v. Bradstreet, 1 Sch. and Lefr. 70.

[w] Lee and Walwyn, 9 Ves. 31.

[x] 12 Ves. 239.

[y] 3 Ch. Ca. 3 Prec. Ch. 99.

[z] Sparrow v. Hardcastle, cited 2 Ves. Jun. 433.

[a] Pettat v. Ellis, 9 Ves. 563.

entailed with Remainders, and such Entail and Remainders may be barred by a Fine and Recovery, and a Husband may be Tenant by the Curtesy of the Mortgaged Premises [b].

If, indeed, an *Advowson* be mortgaged, and is absolute in the Mortgagee, and becomes void, the Mortgagee, it seems, is entitled to present [c], he having the Legal Estate; but Equity will compel him to present such person as the Mortgagor shall nominate [d]; but if a Manor is mortgaged with an Advowson appendant, and the Church becomes void, the Mortgagee though in possession is not entitled to present, but the Mortgagor must present, unless foreclosed [e]; or rather, perhaps, the Mortgagor must present such person as the Mortgagee shall nominate [f].

When, upon a mortgage, Money is made payable to the Heir or Executor, in such case, before the day, or at the day of payment, the Mortgagor has an election to pay it to which he pleases [g]. But after the day of payment is over, (unless there be a reinfeoffment [h],) and the Mortgage is forfeited at Law, though Equity gives the Mort-

[b] Casbourne v. Scarfe, 1 Atk. 603. S. C. when at the Rolls, MS. where Sir Joseph Jekyll held there could not be a Tenancy by the Curtesy of an Equity of Redemption; and see 2 Eq. Abr. 594. as to tenancy by the Curtesy, and Roberts and Dixwell, 1 Atk. 608.

[c] Dyer v. Lord Craven, 1 Dick. 662.

[d] Croft v. Powell, Com. Rep, 609. argo.

[e] Amhurst v. Dawling, 2 Vern. 401.

[f] Jory v. Cox, Prec. Chan. 71.

[g] Anon. 2 Freem. 20. Rightson v. Overton, ib. p. 20; and see Canning v. Hickes, 1 Vern. 412. S. C. 2 Ch. Cas. 187; and see 1 Ch. Rep. 283. 2 Ch. Rep. 220.

[h] See Rightson v. Overton, 2 Freem. 21.

gagor relief, so as upon payment of the Money he shall have his Land, yet Equity will not revive the election of the Mortgagor to pay it to the Heir or Executor. But if in the Mortgage neither Heir nor Executor be mentioned, then after the death of the Mortgagee the Law determines it to be paid to the Executor[i]. It has been held that, if there be a Mortgage in Fee, and two descents cast, and more due upon it than the value, and the Mortgagor refuses to redeem, yet it shall go to the Executor and not to the Heir, the Equity of Redemption not being foreclosed, or released[k].

The principal occasions on which the attention of Courts of Equity is called towards Mortgages, is upon Bills filed, 1. to *redeem;* and 2. to *foreclose*, a Mortgage; and in respect of what are termed, 3. *Equitable Mortgages.*

1. The right to *redeem a* Mortgage is carefully protected by Courts of Equity, and they will not suffer any Agreement in a Mortgage Deed to prevail, that the Estate shall become an absolute purchase in the Mortgagee upon any event whatever[l]; and the reason is, because it puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the Lender[m]. The Rule is, "*once a Mortgage and always a Mortgage*[n]."

[i] Anon. 2 Freem. p. 12. Rightson v. Overton, ib. p. 20.

[k] Tabor v. Grover, 2 Vern. 367. S. C. 2 Freem. 227.

[l] See Howard v. Harris, 1 Vern. 190. S. C. 2 Ch. Ca. 147. Treatise of Eq. 2 Vol. 259. James v. Oades, 2 Vern. 402.

[m] Toomes v. Conset, 3 Atk. 261.

[n] Newcombe v. Bonham, 1 Vern. 8. Howard v. Harris,

No Agreement of the Parties can affect the doctrine as to Redemption in a Court of Equity [o]. "You shall not," (says Lord *Eldon*, "by special terms alter, what this Court says are the special terms of that contract [p]." But though any fetters laid upon redeeming a Mortgaged Estate, by some original Agreement, either in the Mortgage Deed, or a separate Deed will not avail, where it is done with a design to wrest the Estate fraudulently out of the hands of the Mortgagor, yet if on Money advanced, an Estate be leased for 5000 years at a certain Rent for the three first years of the Term, and at another Rent for the Remainder of the term, with a proviso, that if at three years end, the Money advanced and Interest is paid, then the Premises shall be reconveyed, this is a good conveyance, and if the Money is not paid according to the Proviso, the Interest granted, will, it has been held, be irredeemably vested in the Party [q].

What is called a *Welch Mortgage*, is a perpetual power of Redemption, subsisting for ever, and where the Mortgagee cannot compel a *redemption* or a foreclosure [r]; but there are circumstances which may create a bar even in Mortgages of this description [s].

[o] 1 Vern. 33. James v. Oades, 2 Vern. 402. See Floyer v. Lavington, 1 P. Wms. 268. and the cases cited in that case. Newcombe v. Bonham, 1 Vern. 7. S. C. 2 Ventr. 364. 2 Ch. Ca. 58, 159.

[p] Seton v. Slade, 7 Ves. 273.

[q] Mellor v. Lees, 2 Atk. 494.

[r] Linguet against Scawen, 1 Ves. 406.

[s] Yates v. Hambly, 2 Atk. 363.

All *Welch* Mortgages, it is observable, are without a Covenant to repay the Mortgage Money [t].

An Equity of Redemption is considered as a Title in Equity, and not merely as a Trust, from which in many respects it materially differs [u]. Sir *Matthew Hale* says, "a Power of redemption is an equitable right inherent in the Land, and binds all persons in the post or otherwise; because it is an ancient right which the Party is entitled to in Equity [v]."

Where a Mortgagee has been *in possession twenty years*, without any impediment in the Mortgagor to assert his title, such as Imprisonment, Infancy, Coverture, being beyond Sea, &c. (where it is not by having absconded;) or if such impediment has been removed ten years, it is a bar to a Redemption [w]. And in such case, it seems, a *Demurrer* will lie to a Bill for an account [x]. And though Infancy may be an Answer to the objection as to length of time in not coming to redeem, yet where the time begins upon the Ancestor, it will run on against his Infant Heir, as in the case of a fine at Common Law [y].

[t] Lawley v. Hooper, 3 Atk. 280.

[u] Tucker v. Thurstan, 17 Ves. 133.

[v] Pawlet v. Attorney Gen. Hard. 465.

[w] Tenner v. Tracey, mentioned in note B. to 3 P. Wms. 287; and see Bonney v. Ridgard, mentioned from a MS. note in 17 Ves. 99. S. C. but not to this point, 4 Bro. C. C. 125. Trash v. White, 3 Bro. C. C. 289. Floyer v. Lasington, 1 P. Wms. 268. Anon. 3 Atk. 313. Corbett v. Barker, 1 Anstr. 38; and see 2 Anstr. 759. Hodle v. Healey, 1 Ves. and Bea. 539. contra Leman v. Newman, 1 Ves. 51. Exton v. Greaves, 1 Vern. 138.

[x] Esdell against Buchanan, 4 Bro. C. C. 254. S. C. 2 Ves. Jun. 84. Jenner v. Tracey, mentioned in note to 3 P. Wms. 287.

[y] St. John v. Turner, 2 Vern. 419.

The Rule, it has been said, is not founded on a presumption of an absolute conveyance, but is merely a positive rule introduced for the sake of quieting the Title after so long a neglect to redeem, analogous to the Statutes of Limitations at Law [z]. If, however, there have been *acknowledgments* that the Estate was held in Mortgage, and accounts have been kept, it seems, that a possession even of fifty years [a],---a Mortgage, ever so old [b], will not bar a Redemption. And if a Man takes notice by a Will, or any other deliberate act [c], an answer, for instance, to a Bill in Chancery [d], that he is a Mortgagee, acknowledgments of that nature will take the case out of the Rule that a Mortgagor shall not redeem after twenty years ; but the mere demand of an account, is not alone sufficient to prevent the effect of such a length of time [e].

If a Mortgagor agrees that the Mortgagee shall enter and hold till he is satisfied, length of time is no objection to a redemption [f]. And where it so happens that the person to pay the Interest on the Mortgage, is the same person who is to receive it, as if Tenant for Life has conveyed his Life Estate to the Mortgagee, there, the presump-

[z] Corbet v. Barker, 1 Anstr. 138; and see 2 Anstr. 759. Belch v. Harvey, M. S.

[a] See Lake v. Thomas, 3 Ves. 17 ; and see what is said in Esdell v. Buchanan, 2 Ves. Jun. 84. S. C. 4 Bro. C. C. 256. and Proctor v. Cowper, 2 Vern. 377. S. C. Prec. Ch. 116.

[b] 1 P. Wms. 271. Anon. 2 Atk. 333. Yates v. Hambly, 2 Atk. 263.

[c] Perry against Marston, 3 Bro. C. C. 399. Anon. 3 Atk. 314.

[d] Proctor v. Oates, 2 Atk. 140.

[e] Hodle v. Healey, 1 Ves. and Bea. 540.

[f] Orde v. Heming, 1 Vern. 418.

tion does not arise, and though twenty years elapse, the Mortgage is redeemable [z].

The right of Redemption is not confined to the Mortgagor, his Heirs, Executors, Assignees or subsequent Incumbrancers, but extends to all persons claiming any Interest whatever in the Premises, as against the Mortgagor: a person, therefore, claiming under a void Deed (as being voluntary) against a subsequent Mortgagee, may redeem; for the Deed though void as to the Mortgagee, is binding on the Mortgagor; *a fortiori*, may any person redeem who has acquired for a valuable consideration, an Interest in the Land; as a Tenant under the Mortgagor, or a Tenant by Elegit, Statute Merchant, or Staple, or Tenant by the Curtesy, or in Dower, or a Jointress; and the Crown may also redeem Estates mortgaged, and afterwards forfeited by the treason, or otherwise, of the Mortgagor [a].

If a Mortgage by the attainder of the Mortgagee is in the hands of the Crown, a Bill lies against the Attorney General to redeem [b].

An Equity of Redemption cannot be affected by an Execution [c]; but a Judgment Creditor may file a Bill to redeem an Incumbrance [d], provided he has taken out Execution [e].

2. With respect to the *Foreclosure of a Mortgage*, it has been determined, that a Mortgagee

[z] Corbet v. Barker, 3 Anstr. 755.

[a] See 1 Fonb. Trea. Eq. 267. n. p. and the Authorities there cited.

[b] Pawlet v. Attorney Genl. Hard. 465.

[c] Lyster v. Dolland, 3 Bro. C. C. 478.

[d] Burdon v. Kennedy, 3 Atk. 739. King v. Manissal, 3 Atk. 192. Sharpe v. Earl of Scarborough, 4 Ves. 542.

[e] Shirley v. Watts, 3 Atk. 200.

may file a Bill of Foreclosure, without taking possession. A Mortgagee cannot be compelled to take possession; for, by so doing, he would subject himself to an account, which the Court will not force him to do [e].

After the death of the Mortgagor, in case the personal Estate of the Mortgagor is deficient, a Mortgagee may pray a Sale of the mortgaged Premises, in the first instance, where the Heir and personal Representative are the same Person [f].

Where an *Advowson* is mortgaged, instead of bringing a Bill of *Foreclosure*, the Mortgagee should pray a *Sale of the Advowson* [g].

A *Pawnee* of stock is not bound to bring a Bill of Foreclosure of the Equity of Redemption of the Stock, but may sell it [h]. And it has been held that *Exchequer Annuities* [i], or *East India Stock* [k] mortgaged, may be sold upon notice, without a Bill of a Foreclosure, which, it seems, would be dismissed [l]. But a Mortgagor of Stock, may file a Bill for an account of what is due, and to have a transfer [m].

A Mortgagee of a *copyhold* Estate, who is not

[e] Lord Penrhyn v. Hughes, 5 Ves. 106.
[f] Daniel against Shipwith, 2 Bro. C. C. 155.
[g] Mackenzie v. Robinson, 3 Atk. 559.
[h] Kempe v. Westbrooke, 1 Ves. 278.
[i] Tucker v. Wilson, 1 P. Wms. 261. on Appeal, 1 Bro. P. C. 494.
[k] Lockwood v. Ewer, 2 Atk. 303.
[l] Ib.
[m] 1 Ves. 278.

in possession, may bring his bill against a Mortgagor, before admittance, for a decree of Foreclosure, and after he has obtained such a decree, may bring his Ejectment for possession of the mortgaged Premises[n].

Where a Bill is brought to foreclose a Mortgage of an *Estate Tail*, the Court does not compel the Tenant in tail specifically to suffer a Recovery, but decrees him to make *a good title* to the Mortgagor[o]. The Covenant of a Tenant in tail Mortgagor, for *further assurance*, may be laid hold of as a ground to enforce a Recovery[p].

Where a Trustee had laid out the Money of different Persons on a Mortgage, a Foreclosure was permitted by one Cestui que Trust, as to his Share[q]. And where a Mortgagee had assigned the mortgaged Property to a Person in Trust, for three others who advanced a third each of the Money, one of the three was permitted to file a Bill to foreclose, but the other two were considered as necessary Parties, they all being Joint-tenants[r].

If a Bill filed by a Mortgagor, for a Redemption, is dismissed, the Money not being paid at the Time[s], that operates as a Foreclosure, and is equivalent to a decree for a Foreclosure[t].

[n] Sutton v. Stone, 2 Atk. 101.

[o] Sutton v. Stone, 2 Atk. 101.

[p] Tourle v. Rand, 2 Bro. C. C. 650. Pye and Daubuz, 3 Bro. C. C. 595.

[q] Montgomerie v. The Marquis of Bath, 3 Ves. 560.

[r] Lowe v. Morgan, 3 Ves. 368.

[s] Stewart against Worral, 1 Bro. C. C. 581.

[t] Bishop of Winchester v. Payne, 11 Ves. 199. Garth v. Ward, 2 Atk. 174.

If, after a Foreclosure and a Sale, the Mortgagee brings an Action for the Balance, this in general opens the Foreclosure[u]; but where the Mortgagee had taken Possession a considerable time, and the Balance was inconsiderable, a *perpetual* Injunction was decreed[v].

An Executor of a Mortgagee will be restrained from enforcing Payment, and the Money will be ordered into Court, where there is no Heir of the Mortgagee who can reconvey[w].

In those cases where a Mortgage is sought to be redeemed, the doctrine as to what is termed *tacking*, frequently comes under consideration.

Tacking is prevented in *Ireland* by the effect of the Register Act in that Country[x]; but in *England* it is a rule (and it has great appearance of hardship, though fully established[y]), that if a third Mortgagee buys in the first Mortgage, he acquires a title in Law, and having equal equity, shall, in the language of the Cases, *squeeze out the second Mortgagee*, provided the third Mortgagee, when he lent his Money, had no notice of the second Mortgage[z]. And the rule is

[u] Dashwood v. Blythway, Eq. Cas. Abr. 317.

[v] Perry v. Barker, 8 Ves. 527. and S. C. 13 Ves. 198. S. C. MS.

[w] Schoole and Wife v. Sall, 1 Sch. and Lefr. 177.

[x] 6 Anne, c. 2. vid. Latouch v. Lord Dunsany, 1 Sch. and Lefr. 157. Bond and Hopkins, 1 Sch. and Lefr. 430.

[y] 2 Ves. 573.

[z] Anon. Freem. 2 Vol. 6. and the S. P. p. 14. The rule was also solemnly laid down in Marsh v. Lee, 2 Vent. 337. S. C. 1 Ch. Ca. 172. wherein that great man Sir Matthew Hale (then Chief Baron,) was called by the Chancellor to his assistance. See also Edmonds v. Povey, 1

the same, even though the third Mortgagee buys in the first Mortgage, pending a Bill brought by the second Mortgagee to redeem the first [a], unless the Suit has proceeded so far as to a Decree, and a direction to settle Priorities [b].

But a prior Mortgagee who has an assignment of a third Mortgage as a Trustee only [c], or who has a Mortgage of the Equity of Redemption coming to him as Executor [d], cannot tack the two Mortgages, to the prejudice of intervening incumbrances.

If a *Judgment Creditor*, or *Creditor by Statute or Recognizance*, buys in the first Mortgage, he cannot tack or unite this to his Judgment, &c. and thereby gain a preference; for he did not advance his Money on the Credit of the Land [e]; but if a third Mortgagee buys in a Statute, (and holds both in the same right [f],) he is allowed to unite the Statute to his third Mortgage, for the Land was in the view and contemplation of the Lender [g]; and the Judgment Creditor, by virtue of an Elegit might bring an Ejectment, and hold upon the extended value, and as he has the legal in-

Vern. 187. Morret v. Pask, 2 Atk. 52. Brace v. Duchess of Marlborough, 2 P. Wms. 491, 495. Pre. Ch. 249. Bacon's Tracts 55.

[a] Hawkins v. Taylor, 2 Vern. 29. Turner v. Richmond, 2 Vern. 81. 2 P. Wms. 491.

[b] Wortley v. Birkhead, 2 Ves. 571. S. C. 3 Atk. 811. and see Earl of Bristol v. Hungerford, 2 Vern. 524. Exparte Knott, 11 Ves. 619.

[c] Morret v. Paske, 2 Atk. 53.

[d] Barnet v. Weston, 12 Ves. 130.

[e] 2 P. Wms. 491, 493.

[f] Morret v. Paske, 2 Atk. 53. Stanton v. Sadler, 2 Vern. 30.

[g] Higgon v. Syddal, 1 Ch. Ca. 149. 2 P. Wms. 493,4.

terest in the Estate, the Court will not take it from him [h].

If a first Mortgagee lends a further Sum to the Mortgagor [i], upon a Statute or Judgment, he may retain, not only against the Mortgagor, but against a mesne Mortgagee (provided he had no notice of such mesne Mortgage) till both the Mortgage and Statute, or Judgment, be paid [k].

Where there are subsequent Incumbrances or Creditors in the Case, there, a Man, that buys in a prior Incumbrance, shall be allowed only, what he really paid, though there was in truth a greater Sum due upon such prior Incumbrance; but where the Mortgagor or his Heir comes to redeem, there is no reason that he should have the benefit of a good Bargain made by another Man, and must therefore pay what is really due on the Mortgage, whatever it be, without respect to what the Assignee paid [l].

Where a first Incumbrancer by Judgment, has likewise a Mortgage, though there is another Judgment prior to the Mortgage, yet if the Mortgagee had no Notice of it, the Court will not direct a Sale of the Estate in favor of the Creditor, upon the second Judgment, unless he will

[h] Morret v. Paske, 2 Atk. 53.

[i] Matthews v. Cartwright, 2 Atk. 347.

[k] 2 P. Wms. 494. and see Shepherd v. Tilley, 2 Atk. 352. Mr. Freeman puts a similar Case, 2 Freem. p. 7. Shepherd v. Tilley, 2 Atk. 348. Baker v. Harris, 16 Ves. 399.

[l] Williams v. Springfield, 1 Vern. 476. and see Darcey v. Hall, 1 Vern. 49. Phillips v. Vaughan, 1 Vern. 336. Ascough v. Johnson, 2 Vern. 66.

pay off the Principal and Interest of the first Judgment and Mortgage[m].

A Mortgagee is not permitted to tack as against Assignees in Bankruptcy, a Mortgage *subsequent* to an act of Bankruptcy, though without notice, and previous to the Commission[n], for by such Mortgage no interest passes[o].

An Heir, or the Devisee of mortgaged Premises[p], cannot redeem a Mortgage without paying a Bond[q], though there is no Judgment; and this, to prevent a circuity of Action; but that Equity does not prevail against a Purchaser, an Assignee of the Equity of Redemption for instance[r], the bond Creditor having no lien upon the Land[s]; nor[t] can he tack where there are intervening Incumbrancers of a superior nature between his Mortgage and the Bond[t]; nor can a Bond be tacked to a Mortgage as against Creditors, though it may, against the Heir[u]. If an Estate be devised for payment of Debts, a Mortgagee cannot tack a Bond to his Mortgage, as against the Creditors[v].

[m] Sir H. Smithson v. Thompson, 1 Atk. 520.

[n] Archer v. Snatt, 2 Str. 1107.

[o] Ex parte Knott, 11 Ves. 686.

[p] 3 Atk. 630. and see Ambl. 686.

[q] Coleman v. Winch, 1 P. Wms. 775. Anon. 2 Ves. 662. Shuttleworth v. Laycock, 1 Vern. 245.

[r] Coleman v. Winch, 1 P. Wms. 775. Troughton v. Troughton, 3 Atk. 657. S. C. 1 Ves. 86.

[s] Ex parte Herbert, 13 Ves. 183. overruling Collet v. De Golls, For. 65. see also 1 Schoales and Le Froy 152.

[t] Powis v. Corbet, 3 Atk. 556.

[u] Hamerton v. Rogers, 1 Ves. jun. 513. Lowthian against Hassel, 3 Bro. C. C. 162. and see Vanderzee against Willis, 3 Bro. C. C. 23. and Coleman v. Winch, 1 P. Wms. 776.

[v] Heames v. Bance, 3 Atk. 630. Price against Fastnedge, Ambl. 686.

If an Executor brings a Bill to redeem a Mortgage of a term for Years, he must pay a bond Debt also due; but if the Equity of Redemption be assigned by the Executor, the Assignee may redeem, without paying the Bond.[w]

If the Heir of a Mortgagor of *Copyhold* Premises, files a Bill to redeem, the Defendant cannot insist upon tacking a *Judgment*, because the Copyhold Lands are not liable to an Execution upon a Judgment[x].

It has been holden that, where A. had two Mortgages, on different independent Estates of the Mortgagor, one, a deficient Security, and the other, more than sufficient, the Mortgagor cannot redeem the last, without making good the deficiency of the other Security[y]. Nor, where there are two separate Mortgages of different Estates to the same Person, can a Purchaser of the Equity of Redemption of one of them, redeem that Mortgage only: if he redeems at all, he must redeem both[z].

In respect of *the manner in which the Account is to be taken as between the Mortgagor and Mortgagee*, it appears to be a Rule, that wherever the gross Sum received, exceeds the Interest, it shall be applied to sink the Principal[a]. And

[w] Coleman v. Winch, 1 P. Wms. 776.

[x] Heir of Carron and Park, Vin. Abr. Tit. Copyhold, (O.E.) Ca. 6.

[y] Shuttleworth v. Laycock, 1 Vern. 245. Margrave v. Le Hooke, 2 Vern. 207. Pope v. Onslow, 2 Vern. 286, and what is said Arg. 1 Vern. 29. Sed vid. observation on Pope v. Onslow by Lord Hardwicke, in ex parte King, 1 Atk. 300.

[z] Ex parte Carter, Ambl. 733.

[a] Gould v. Tancred, 2 Atk. 534.

where a Mortgagee enters into possession of the Estate, and does by his own act render himself accountable for what he receives, in discharge of his Principal, and Interest, *Annual Rests* will be directed [b]. It has been held, however, that if a Mortgagee enters, by Agreement, into possession of the Mortgaged Lands, at a fair Rent, in discharge of the Debt, this forms an exception to the general Rule, and he will not be compelled to account for the full value of the Lands [c].

If the Mortgagor is permitted to remain in possession, he is not liable to account for the Rents and Profits to the Mortgagee [d], not even if the Security becomes insufficient [e].

A Mortgagee in possession is not obliged to lay out Money any further than to keep the Estate in necessary repair [f]; nor is he bound to leave the Premises in as good condition as he found them [g]. And if a Mortgagee has expended Money in supporting the right of the Mortgagor to the Estate, where his Title has been impeached, the Mortgagee may add this to the principal of his debt; and it shall carry Interest [h], at the same rate as the Mortgage debt [i].

[b] Robinson v. Cumming, 2 Atk. 410.

[c] Moroney v. O'Dea, 1 Ball and Smith, 117; Sed vid. Webb and Rorke, 2 Sch. and Lefr. 661.

[d] Mead v. Lord Orrery, 3 Atk. 244.

[e] Higgins v. York Buildings Company, 2 Atk. 107. Colman v. Duke of St. Albans, 3 Ves. 25.

[f] Godfrey v. Watson, 3 Atk. 518.

[g] Russell v. Smithies, 1 Anstr. 96.

[h] 3 Atk. 518.

[i] Woolley v. Drag, 2 Anstr. 531.

If a Mortgagee of a Leasehold Interest, pays renewal Fines, he is entitled to be reimbursed out of the Estate[k].

If a Mortgagee in Possession is guilty of gross mismanagement of the Mortgaged Estate, he is answerable for it; but he is liable only for *wilful default*: if he speculates, it is at his own hazard[l]. If he turns out, or refuses, a sufficient Tenant, he will be accountable[m].

A Mortgagee is not allowed to make a charge as Receiver, if he himself has personally received the Rents[n]; and this, though it be agreed he should be paid for his trouble in receiving the Rents[o]; and though a Receiver might have been employed at the expence of the Mortgagor[p]: but if he actually paid a Bailiff for receiving the Rents, he will be allowed such payment[q].

Interest upon Interest is not allowed in the case of a Mortgage[r]. To make Interest on a Mortgage, principal, it is requisite there should be *a writing signed by the Parties*, the Estate in the Land being to be charged[s].

And when by a decree on a Bill of Foreclosure, a reference is made to a Master, to see what is due,

[k] Hamilton v. Denny, 1 Ball and Beatty, 202. Manlove v. Bale and Bruton, 2 Vern. 84.

[l] Hughes v. Williams, 12 Ves. 493.

[m] Anon. 1 Vern. 45.

[n] Godfrey v. Watson, 3 Atk. 518. Bonithon v. Hockmore, 1 Vern. 316.

[o] French v. Baron, 2 Atk. 120.

[p] Langstaffe v. Fenwick, 10 Ves. 405; and see on this subject Gould v. Tancred, 2 Atk. 534.

[q] Godfrey v. Watson, 3 Atk. 518. Bonithon v. Hockmore, 1 Vern. 316.

[r] Ex parte Campion, 3 Bro. C. C. 440. see on this subject 2 Atk. 534. Thornhill v. Evans, 2 Atk. 331.

[s] Browne v. Barkham, 1 P. Wms. 653. See decree in Thornhill v. Evans, 2 Atk. 332. n. 1.

and the Master reports what is due for Principal, Interest and Costs, Interest will, by a subsequent order, be allowed upon the whole amount of what is due, except, perhaps, in the case of an Infant[t].

If money be lent in Town on Mortgage, the Mortgagor may give notice for payment of the same in Town, though the Mortgagee live in *Oxford*; but the Mortgagor must be ready to pay at the time, and from that time keep his Money ready, to prevent Interest running on[u].

Where a Mortgage carries five per Cent. Interest, and the Mortgagee together with Bond Creditors file a Bill for a Sale of the Estate, only four per Cent. Interest will be allowed from the confirmation of the Report[v].

A prior Incumbrancer cannot turn interest into principal against a subsequent Incumbrancer having notice[w].

An Account settled before a Master between a Mortgagor and the first Mortgagee, binds the second Mortgagee, unless fraud and collusion is shewn[x].

3. In respect to *Equitable Mortgages*, it has long been settled, notwithstanding the *Statute of Frauds*, (29 Car. 2. c. 3. s. 4.) that a mere deposit of Title Deeds, upon an advance of Money, without a word passing, gives an Equitable lien[y], even

[t] See Bennett v. Edwards, 2 Vern. 292.

[u] Gyles v. Hall, 2 P. Wms. 378; and see Bishop v. Church, 2 Ves. 372.

[v] Harris v. Harris, 3 Atk. 722.

[w] Digby against Craggs, Ambl. 612.

[x] Needler v. Deeble, 1 Ch. Ca. 299. S. C. 1 Eq. Cas. Abr. p. 12.

[y] See Ex parte Langston, 17 Ves. 227; and see Russell v. Russell, 1 Bro. C. C. 269.

against a subsequent Purchaser without notice [a]; and such deposit will cover subsequent advances, if it appear by Evidence, that they were made upon the faith of that Security [a]. But it has never yet been decided, how far it is necessary to deliver *all* the title deeds: or whether that would not be taken to be a sufficient deposit, which could be taken upon looking at the Instruments to amount to evidence, that the Estate was meant to be a security [b]; but it has been held, that the delivery of deeds, for the purpose of having a Mortgage drawn, will not amount to a deposit or Equitable Mortgage [c].

The meaning and object of a deposit may, it seems, be explained by parol Evidence; a circumstance which has often been lamented [d].

Indeed, equitable Mortgages by the deposit of Deeds, &c. are not favoured, especially when contradicting a written Instrument [e].

It seems, though no case has so determined it, that if the deposit is in the hands of a third person, that may be considered as a deposit for the Creditor, provided that is proved to be the Intention. It is very delicate when the Deposit remains in the hands of the Mortgagor himself,

the first case establishing these Equitable Mortgages, and a decision frequently lamented.

[a] Hiern v. Mill, 13 Ves. 114. but see Birch v. Ellames, 2 Anstr. 431. Plumb v. Fluit, 2 Anst. 432.

[a] But see Vanderzee against Willis, 3 Bro. C. C. 23.

[b] Ex parte Wetherell, 11 Ves. 401.

[c] Norris v. Wilkinson, 12 Ves. 192.

[d] Ex parte Haigh, 9 Ves. 403; and see particularly Norris v. Wilkinson, 12 Ves. 199.

[e] Ex parte Combe, 17 Ves. 360.

and it seems questionable, whether a mere memorandum, kept in his own possession, and not parted with to the Man in whose favour it is expressed, or if Deeds were put into the hands of the Wife of the Mortgagor[f], it would take the case out of the Statute.

In the case of an Equitable Mortgage, by the deposit of a Mortgage Deed, if no notice is given to the Mortgagor, and he makes payments to the original Mortgagee, the Assignee takes, subject to the account between the Mortgagor and Mortgagee.

An Equitable Mortgage will be made good as against Assignees[g].

In a case, where an Assignee bought the Bankrupt's Estate, and out of the consideration Money paid an Equitable Mortgagee, and took the deeds, which Sale was afterwards set aside, on the known principles of the Court[h], it was held that the Equitable Mortgagee did not lose his lien[i].

Where a Lease was deposited to secure a debt, the depositary was, on a Bill filed by the Lessor, decreed to perform the Covenants, and take an Assignment paying the costs of it: and it was held, he could not abandon it; for being entitled to a legal Conveyance, he is considered as having it[k].

[f] Vid. Ex parte Coming, 9 Ves. 117.

[g] Jones v. Gibbons, 9 Ves. 411. Pye v. Daubuz, 2 Dick. 759.

[h] See ante, p. 91.

[i] Ex parte Morgan, 12 Ves. 6.

[k] Lucas v. Commerford, 1 Ves. Jun. 235. S. C. 3 Bro. C. C. 166.

An Assignment of *Rents and Profits*, or of *Deeds*, gives an equitable lien; and entitles the Party to insist upon a Mortgage[l].

Trusts, created by Deed, for the payment of debts, or of compositions for debts, are frequent, and Courts of Equity will assist in the enforcement of Agreements for a composition, if obtained without fraud, or misrepresentation[m]. Underhand Agreements, upon these occasions, have already been observed upon, under the head of Fraud[n].

When a Man conveys Land for the payment of his debts, and keeps possession of the conveyance, it is considered as fraudulent[o].

An Assignment of *all a Trader's* Property, though for the benefit of all his creditors, amounts to an *Act of Bankruptcy*, the reason being, that a Trader has not a right by deed, to place his Property under a distribution, different from that ordained by the Bankrupt Law[p]. And though there be a provision in the Assignment of the whole, or nearly the whole of a Trader's Estate and Effects, that the Deed is to be void, if a commission of Bankruptcy shall be taken out, or if all the Creditors whose Debts amount to £20, do not sign within a given time, yet still such an Assignment, notwithstanding such condition, amounts to an Act of Bankruptcy[q].

[l] Ex parte Willis, 1 Ves. Jun. 162.

[m] Pollen v. Husband, 1 P. Wms. 427. Cann v. Cann, 1 P. Wms. 727.

[n] Ante, p. 226.

[o] Tarbuck v. Marbury, 2 Vern. 510.

[p] Ex parte Bourne, 16 Ves. 148. Cook's Bankrupt Law, edit. 5. p. 89; and see Dutton v. Morrison, 17 Ves. 197.

[q] Dutton v. Morrison, 17 Ves. 197, 8.

It was the repeated doctrine of *Lord Mansfield*[r], that every act done with a view to defeat the Bankrupt Laws, by giving a preference to Creditors, is fraudulent and void, and if *by deed* is an Act of Bankruptcy; but a Trader, it seems, may shew a preference to particular Creditors, provided it is not done under the apprehension of bankruptcy, and the property so conveyed, does not exhaust the whole Estate, or what remains is not colourably left[s].

The *Surrender of a Copyhold* Estate in favor of a *particular Creditor*, is not an Act of Bankruptcy under the 1 Jac. 1. c. 15. s. 2. because it does not defeat or delay Creditors, the Copyhold being neither liable to a *fieri facias* or *an elegit*[t].

A. brought an Action against *B.* for adultery with his Wife, and thereupon *B.* assigned his Estate to Trustees, in Trust to pay debts mentioned in a schedule, and such other debts as he should name within ten days; and afterwards *A.* recovered £5000 damages, and filed a Bill to set aside the Deed, but it was held not to be fraudulent; *A.* being no Creditor on the execution of the Deed, and his debt recovered after, being founded *in maleficio*[u].

[r] Worsley v. De Mattos, 1 Burr. 467. Hague v. Rollis-ton, 4 Burr. 2174. Alderson v. Temple, 4 Burr. 2235. Harman v. Fisher, Cowp. 117. Rust v. Cooper, Cowp. 629. Hassell v. Simpson, Dougl. 89. S. C. 1 Bro. C. C. 99. Devon v. Walls, Dougl. 86. Butcher v. Easts, Dougl. 294.

[s] Jacob v. Shepherd, 1 Burr. 478. Unwin v. Oliver, mentioned in 1 Burr. 481.

[t] Ex parte Cockshott, 3 Bro. C. C. 502.

[u] Lewkner v. Freeman, Prec. Ch. 105.

If a Man, in his Life, creates a Trust for payment of debts, and annexes a schedule of some debts, and creates a Trust term for the payment, as that is in the nature of a specialty, it will make these, though simple contract debts, carry interest [v].

A Bill by such Creditors as had signed a Deed of composition arising from a Trust Estate, conveyed for the purpose of paying debts in general, other Creditors refusing to come in, to have the Trusts of the Deed carried into Execution, has been dismissed [w]; but, it seems, a Bill may be exhibited by those Creditors, who come in under the Trust Deed, against those who stand out, to come in, or renounce the benefit of the Trust [x].

It seems doubtful, whether under a Trust "to raise Money by Sale or Sales, Mortgage or Mortgages," and Money is raised by Mortgage, the Trustees have power to sell the Estate to pay off that Mortgage [y].

Where a Deed of Trust is made for payment of debts, it extends only to debts contracted at the time of making the Deed [z].

4. By the *Common* Law, a *Chose in Action* cannot be assigned, or granted over [a], except in

[v] Barwell v. Parker, 2 Ves. 363. and see Countess of Kildare v. Hobson, 4 Bro. P. C. 164.

[w] Atherton v. Worth, 1 Dick. 375.

[x] Dunch v. Kent, 1 Vern. 260. but see Atherton v. Worth, 1 Dick. 375.

[y] Palk v. Lord Clinton, 12 Ves. 48.

[z] Purefoy v. Purefoy, 2 Dick. 28. S. C. 1 Vern. 28. but see Lewkner v. Freeman, Prec. Ch. 105.

[a] Lampet's case, 10 Co. 48ª.

the case of the *King*, who may either grant or receive a *Chose in Action*, by Assignment [b]; but in Equity, a *Chose in Action* may, for a consideration [c], be assigned [d], and is good against Creditors under a Bankruptcy [e]; and in the Assignment, no particular words are necessary [f], though it usually contains an Agreement to permit the Assignee to make use of the name of the Assignor to recover the property, and is considered in the nature of a Declaration of Trust [g]. And though a *Chose in Action* be assigned in consideration of love and affection and advancement of children, it is good against the Representatives of the Assignor [h].

A *Chose in Action*, once assigned, cannot, generally speaking, be afterwards assigned, though the Assignment be without notice [i]. If, however, the Purchaser of an equitable right, gives no notice to the Trustee of his purchase, and such equitable right is afterwards assigned to a second Purchaser, who gives notice of his Assignment, he, it has been thought, would be preferred [k].

[b] See 2 Ves. 181.

[c] In Lord Carteret v. Paschall, 3 P. Wms. 199. it was held it might be assigned without consideration; but see 2 Vern. 595. 3 Chan. Rep. 90. Anon. 2 Freem. 145. Robinson v. Bavasor, Vin. Abr. tit. Assignment. (D) Ca. 29.

[d] Squib v. Wynn, 1 P. Wms. 381. Wright v. Wright, 1 Ves. 411. Row v. Dawson, 1 Ves. 335. is. 229. overruling Thomas and Freeman, 2 Vern. 563.

[e] Browne v. Heathcote, 1 Atk. 160.

[f] 1 Ves. 332.

[g] Butl. Co. Lit. 232[b]. n. 1. 3 P. Wms. 199.

[h] Wright v. Wright, 1 Ves. 409. Fearne 550, last edition.

[i] Tourville v. Naish, 3 P. Wms. 307. Brace v. Dutchess of Marlborough, 2 P. Wms. 496.

[k] Sugden's Vend. and Purch. 600. last edit. who cites Stanhope v. Earl Verney, But. note (I.) to Co. Lit. 290[b]. 1 Ves. 367. 9 Ves. 411.

The reason of the Law's not allowing such assignments have been considered as refined [l]; but there seems to have been wisdom in it, (as there is in almost all the provisions of the Common Law,) since it tended to champerty and maintenance, and to pass debts into the hands of the more powerful, who were thus enabled to oppress the inferior orders.

An Assignee of a *Chose in Action*, as he is entitled to all the remedies of the Seller [m], so, he takes it, subject to the same Equity as it was liable to in the Assignor's hands [n], except in the case of the assignment of Bills of Exchange, or notes, before they are due, which may be enforced by an Assignee for a valuable consideration; though no consideration was given by the Person who assigned to him; an exception made in favor of Trade [o].

Where there is an Assignment of a Mortgage, in general cases, the Assignee takes it entirely at his risk as to what is due between the Mortgagor and Mortgagee, upon taking the account from beginning to end, unless the former joins in the assignment [p].

If after an assignment of a Mortgage, payments

[l] Thomas v. Freeman, 2 Vern. 563.

[m] Ex parte Lloyd, 17 Ves. 245.

[n] Coles v. Jones, 2 Vern. 692. Turton and Benson, 2 Vern. 764. Hill and Caillovel, 1 Ves. 122. Davies v. Austen, 1 Ves. Jun. 247.

[o] Anon. Com. Rep. 49. S. C. 2 Eq. Abr. 85.

[p] Chambers v. Goldwin, 9 Ves. 264, 268.

are made to the Mortgagee, without notice of the Assignment, the Assignee must allow such payments; and this, though the assignment of the Mortgage be registered, for the registry is not notice for that purpose [q].

It is ill advised, therefore, to take an assignment of a Mortgage without making the Mortgagor a Party, and being satisfied as to the sum really due [r]. As between the Mortgagee and the Persons claiming under him, *without the privity of the Mortgagor*, they cannot add to what is due, settle the account, or turn the Interest into principal [s].

If a Mortgagor permits an Assignee to pay the Assignor a sum of Money, which he, with the knowledge of the Mortgagor, represents to be due, he will himself be bound by the transaction [t].

If a Legacy be assigned, the Executor, when called upon, cannot set off a debt, due to himself from the Legatee [u].

If a Bond debt be due to *B.*, and *B.* assigns it, the Obligor is bound by *having notice* of the assignment, and his payment to *B.* afterwards, will not be a discharge as to the Assignee [v]. It would be otherwise, if there were no notice of the Assignment [w].

All *possibilities or contingent Interests*, whether

[q] Williams v. Sorrell, 4 Ves. 389.

[r] Matthews v. Wallwyn, 4 Ves. 127.

[s] Ib. 128. and see Askenhurst v. James, 3 Atk. 271; but see contra the decree in Earl of Macclesfield v. Fitton, 1 Vern. 169. in note 1. and Gladwin v. Hitchman, 2 Vern. 135.

[t] Chambers v. Goldwin, 9 Ves. 270.

[u] Whitaker v. Rush, Ambl. 407.

[v] Dict. Langley v. Lord Oxford, Ambl. 17. 2 Vern. 540. Baldwin v. Billingsley.

[w] 1 Chan. Ca. 232.

of Real or Personal Estate, though not grantable at Law, are, it seems, assignable in Equity [x], as well as transmissible, and deviseable [y].

But an assignment of the *half pay* of an officer has, upon grounds of public policy, been held to be bad [z]: though, previous to the Statute [a], the pay of a *seaman* might be assigned [b].

At Law, a Sale by an Heir of his *hope of succession*, is void [c]; though in Equity, there are cases where it has been established [d]; but *Lord Eldon* has expressed a serious doubt upon this point [e].

Not only a Trust in *esse*, but the possibility of a Trust, may be assigned in Equity [f]. Assignments by an Husband, of *Choses in Action*, belonging to his Wife, have before been adverted to [g].

We proceed now to the consideration of,

2. *Express Trusts created by Will.*

The doctrine as to Devises and Bequests taken in its full extent, and comprehending Devises and Bequests of *Legal*, as well as of *Trust* Estates, would, unavoidably, be very voluminous; but it is only the consideration of *Devises and Bequests in Trust*,

[x] Warmistry v. Tanfield, 1 Ch. Rep. 29; and see 1 Ch. Ca. 8.

[y] Fearne on Executory Devises, p. 548. etc. last edit.

[z] Stone v. Lidderdale, 2 Anstr. 539. Hobson and Trevor, 2 P. Wms. 191. Beckley v. Newland, 2 P. Wms. 181. Wright and Wright, 1 Ves. 409. Murat v. Gordon, 1 Anstr. 34. Barnes v. Allen, 1 Bro. C. C. 181. S. C. stated from Register's book, 3 Ves. 208. note (a).

[a] 1 Geo. 2. st. 2. c. 14.

[b] Crouch v. Martin, 2 Vern. 595.

[c] Touchst. 239. Perk. 68. Jones v. Roe, 3 T. R. 88.

[d] Hobson v. Trevor, 2 P. Wms. 191. Beckley v. Newland, 2 P. Wms. 181.

[e] In Harwood v. Tooke, MS.

[f] Warmistry v. Tanfield, 1 Ch. Rep. 29.

[g] Ante 383.

which, consistently with the plan of this Work, is here necessary to be considered; for they alone peculiarly belong to Equitable cognizance. Nor is it all Devises of Land in Trust that will here be considered, but only such where the construction of the words of a Will is different in Equity, from the construction which the same words would receive in a Court of Law; for in those cases where the construction of a Court of Equity upon words, is the same as in a Court of Law, Equity professes to follow the Law, and Common Law decisions must be resorted to, as the most conclusive authorities.

In all those cases where there is an express devise *in Trust*, or where the Estate is in the hands of Trustees, a Court of Equity is exclusively entitled to decide. A Court of Law will not take cognizance of a *Trust:* and so strictly do they adhere to this rule, that if a *Case* be sent to them from the Court of Chancery for their opinion, they will refuse to give it, if the *Case* states a *Trust*.

The Common Law Courts in such cases have no jurisdiction; and on the other hand, generally speaking, the Chancellor has nothing to do with Legal Estates; but his right of deciding as to them, often arises *collaterally*.

If, for instance, an Estate is agreed to be sold, and a Bill is filed by the Vendor to enforce a *specific performance* of the Agreement, in such case, the Vendee may answer, "I am ready to perform my Agreement, if you the Plaintiff can make a good Title." Upon this, as before observed, it is referred to the Master, to consider

if a good title can be made, and upon exceptions, the Chancellor may be called upon to determine as to the legal title to the Estate.

In these, and in a variety of other cases, that might be put, the Chancellor is often called upon to decide on the *legal title* to an Estate, though the Courts of Common Law never can, in any way, be called upon to decide upon the *equitable title* to an Estate.

But though in these instances, the Chancellor may be called upon to decide a strictly legal question, yet if he has any doubt upon the subject, (unless the Parties wish to have a Judgment without directing a case,) he usually directs a case to one of the Law Courts[a]; thus acknowledging those Courts to be, as they certainly are, the most proper *forum* for the decision of such questions. We shall not, therefore, (in conformity with the plan of this work[b], which is exclusively confined to Chancery doctrine,) notice any of those decisions which have been made upon *legal titles*; and shall only premise, that there is no difference between Law and Equity in determining upon the effect of a testamentary act[c], and that the Devise of a Trust must have the same construction as that of a legal Estate[d]; a Court of Equity having (with some few exceptions) no greater latitude in the construction of Wills, than a Court of Law has[e].

[a] See Attorney Gen. and Vigor, 8 Ves. 272.

[b] See Preface.

[c] Habergham v. Vincent, 2 Ves. Jun. 235, 6.

[d] Atkinson v. Hutchinson, 3 P. Wms. 259.

[e] See Duke of Marlborough v. Lord Godolphin, 2 Ves. 74.

The same words which give a legal Estate, in the construction of a Court of Law, do also in the same manner give a Trust Estate in a Court of Equity. Whether an Estate in fee, in Tail, or for Life, or otherwise, passes, is decided by the same Rules as in Courts of Law, whether the Devise be of a Legal or a Trust Estate, except in the case of *Executory Trusts*, there being a difference between, what are termed, "*Trusts executed*," and "*Executory Trusts*."

In the case of a Trust executed, there ought to be no difference of construction in a Court of Equity, from what there is in a Court of Law, upon a legal limitation[f]. It was, indeed, the observation of *Lord Jeffcries*, that the construction of Trusts, must be governed by the intention[g]; but, with the exceptions adverted to, no rule is so strictly adhered to in Equity, and considered so dangerous to depart from, as that the construction of Trusts must be the same as of legal Estates[h]. It is not so to all collateral purposes, since, a Tenant for Life of an equitable Estate, cannot destroy contingent Remainders[i].

The consideration of *Executory Trusts*, is exclusively under the cognizance of a Court of Equity, and there is a series of decisions on that subject, peculiar to those Courts.

[f] Wright v. Pearson, Ambl. 362.

[g] Norton v. Mascall, 2 Vern. 24.

[h] Wright against Englefield, Ambl. 473. Cary v. Bertie, 2 Vern.

[i] Ante, p. 393. this doctrine is expressed doubtfully; but in Chapman v. Blisset, MS. Lord Talbot held, clearly, the Remainder could not be destroyed, S. C. For. 145.

"This," says *Lord Hardwicke* in a case before him upon a devise, "is a mere question of Law, and is already put in a proper course, (a case having been directed,) and unless there was something *executory* in it, I ought not to meddle with it in Equity, except there were some case already in point determined[k]."

So, in regard to *Bequests* of personal Estate, determinations upon them, in most cases, belong, in preference of Courts of Law, to the consideration of Courts of Equity; for Executors or Administrators are considered merely as *Trustees* in a Court of Equity, and all Persons to whom Bequests are made, are considered as *Cestuis que Trusts*, and as such, entitled to have their rights ascertained and protected by a Court of Equity; and to those Courts recourse is usually had, to obtain the benefit of a Bequest of personal property.

We shall, therefore, after a few words upon the general Rules for the *construction of Wills* proceed to consider *Executory Trusts*, and *personal Bequests*.

1. In regard to decisions upon Wills, there is only one general Rule of Construction, equally for Courts of Equity, and Courts of Law; which the Courts are bound to apply, however they may condemn the object. The *Intention* must be followed where it is plain, even though contrary to the legal operation of words in the Will[l]; for in a Will no particular words are required to

[k] Colson v. Colson, 2 Atk. 250.

[l] Cowper v. Earl Cowper, 2 P. Wms. 741.

pass an Estate, but any words that shew the intention of the Testator are sufficient[m]. This *intention* is to be taken from the whole Will taken together, and nothing *dehors* the Will can be produced to explain the same, unless there be a *latent* ambiguity in the Will[n]. Every word is to have its effect. Every word is to be taken according to the natural and common import[o]; but whatever may be the strict grammatical construction of the words of a Will, that is not to govern if the intention of the Testator unavoidably[p] requires a different construction[q].

"If," says *Lord Alvanley*, "upon a general view of the Will, I can collect the general intention, or any one particular object, and there are expressions in the Will, in some degree militating with it, if I plainly see those expressions are inserted by mistake, I may reject them[r]. But I cannot reject any words unless it is perfectly clear, they were inserted by mistake: and if two parts of the Will are totally irreconcileable, I know of no Rule but by taking the subsequent words as an indication of a subsequent intention[s]."

[m] Dobbins v. Bowman, 3 Atk. 409.

[n] Andrews against Emmot, 3 Bro. C. C. 303.

[o] Vid. Thelluson v. Woodford, 4 Ves. 329.

[p] Phillips v. Chamberlaine, 4 Ves. 57.

[q] 4 Ves. 311.

[r] See accord. Haws v. Haws, 3 Atk. 525.

[s] Sims v. Doughty, 5 Ves. 247; and see Constantine v. Constantine, 6 Ves. 102.

In the construction of Wills the Court will not exactly consider the order of placing the words, if it would better answer the apparent intent of the Testator otherwise, and render a limitation sensible[t];—but not to let in different devisees and legatees in a Will[u].

A mistake cannot be corrected, or an omission supplied, unless it is perfectly clear, by fair inference from the whole Will, that there is such mistake or omission[v]. Whenever it comes to be a doubt, the safest way is to adhere to the words[w].

If words of *art* are used, they are to be construed according to the *technical sense*, unless by the *context*, or by *express words*, it is plain, the Testator did not intend them to be taken in that sense[x]. But the Court will abide by the *primâ facie* intention, the settled meaning of the words, until driven out by strong, solid, and rational interpretation, put upon, and plain inference drawn from, the rest of the Will[y].

The Court are bound to carry the Will into effect, provided it is consistent with the Rules of Law; for Men's Deeds and Wills by which they settle their Estates are the Laws that private Men are allowed to make, and they are not to be altered even by the King in his Courts of Law

[t] East v. Cooke, 1 Ves. 32.
[u] Duke of Marlborough v. Lord Godolphin, 2 Ves. 61.
[v] Mellish v. Mellish, 4 Ves. 49. Phillips v. Chamberlaine, 4 Ves. Jun. 57.
[w] Mellish v. Mellish, 4 Ves. 50.
[x] Holloway v. Holloway, 5 Ves. 401. and see Ambl. 377.
[y] Deane v. Test, 9 Ves. 152, 154.

or Conscience[z]; and if the Court can see a general Intention, consistent with the rules of Law, but the Testator has attempted to carry that into effect in a way, that is not permitted, the Court is to give effect to the general intention, though the particular mode shall fail[a]. In some cases, cases of Creditors, an Intention in the Testator may be inferred from the purpose of his Devise, beyond any thing he has said in express terms[b].

Where words in a Will are capable of a two-fold construction, such a construction is received as tends to make it good[c].

It has been said that though the Court can construe and expound the words of a Testator's Will, yet they cannot strike them out of it entirely[d]; and, certainly, a Court will not reject words having an obvious meaning, upon a suspicion that the Testator did not know what he meant[e]; but words may be rejected where they are repugnant to the clear intention manifested in other parts of the Will[f]; but a positive bequest cannot be controuled by inference and argument[g].

It has been observed that if two parts of a Will are totally inconsistent, and cannot possibly be reconciled, the latter shall prevail. Where, however, the same thing has been by different parts of

[z] Lord Falkland v. Bertie, 1 Vern. 337.
[a] Ib. 329.
[b] Ib. 311, 312.
[c] Ib. 312.
[d] Southcote v. Watson, 3 Atk. 233.
[e] Milnes v. Slater, 8 Ves. 306.
[f] Holmes v. Cradock, 3 Ves. 320.
[g] Jones v. Colbeck, 8 Ves. 42.

the Will given to two persons, doubts have been entertained, whether they should not be joint-tenants.

If a meaning can be collected, but it is left wholly doubtful in what manner that is to take effect, the Will is totally void for uncertainty [h].

Such are the rules adopted in respect of judgments upon Wills; and it must be obvious that a decision upon a perplexed Will, must, unavoidably, very much depend on the judicial discretion of a Judge, and cannot, in general, be otherwise characterised, than as "the conjecture of the Judge upon the meaning of the Testator, after hearing his intention discussed upon the whole Will [i]."

2. An *Executory Trust* by will, is where the Will does not give a legal Estate, but only creates a Trust to be carried into execution; where, in short, there is no direct gift made, but it is left to the Law to frame the Conveyance under which the Party is intended to take, by a general expression of Intention [k].

The distinction between Trusts *Executed*, and such as are *executory*, is this. A Trust executed, is where the Testator has given *complete directions* for settling his Estate, with perfect *limitations*. An Executory Trust, is where the Testator's directions are *incomplete*, and are rather *minutes or*

[h] Constantine v. Constantine, 6 Ves. 102.

[i] See what Lord Eldon says, 9 Ves. p. 152. in Deane v. Test.

[k] Countess of Lincoln v. Duke of Newcastle, 12 Ves. 231.

instructions. In the cases of Trusts executed, legal expressions will have a strict legal effect, as in immediate devises at Law, though, perhaps, contrary to the Testator's intention [l]; but in the cases of Executory Trusts, the Court will consider the intention, and direct the Conveyance according to it [m]; and words of limitation, as "Heirs of the body," will be construed as words of purchase, if the Testator has, by expressions in his Will, shewn an intention that they should not be construed in the former sense.

The execution of Executory Trusts created by *Deed*, is the same as of Executory Trusts, created by *Will* [n]. Cases of this description, arising out of *Marriage Articles*, have before [o] been adverted to.

In the cases of *Trusts executed, or immediate devises*, the construction of Courts of Law and Equity, is the same, because the Testator is thought not to suppose, that any further conveyance will be made; but in *Executory Trusts*, he is thought to mean, to leave *somewhat to be done*, the Trusts to be executed in a more careful and more accurate manner; and for that reason, the Court decrees according to the Intent, and not according to the strict legal effect of the

[l] See Shaw v. Weigh, 1 Eq. Abr. 184. Jones v. Morgan, 1 Bro. C. C. 206. Poole v. Poole, 3 Bos. and Pul. 620.

[m] White v. Carter, Ambl. 91. Garth v. Baldwin, 2 Ves. 655.

[n] Vid. what Lord Eldon says 12 Ves. 227.

[o] Ante, p. 50.

terms, used by the Testator[p]. This doctrine appears to have been for the first time authoritatively settled, in the *Attorney General* v. *Sutton*, which went from the Exchequer, to the House of Lords[q].

The case of *Papillon* and *Voice*[r], has often been quoted, in illustration of the Rule of the Court on this subject; for in that case, it is said[s], the legal rule prevailed as to that limitation in the Will which included or carried the *legal Estate*; and the intent was permitted to controul the legal rule, as to that part of the same will, which was purely *executory*, though the words of the Will, were, except as to this difference, exactly the same.

It will, however, be found that, though the distinction between Trusts executed and executory, is well established, yet that *Papillon* and *Voice* is not an authority for it. According to a MS. Report of that case, in the Author's possession, it appears, that after the decree from the Rolls was appealed from, a *Supplemental Bill* was filed by the Plaintiff, setting forth that, upon his Father's death, he covenanted to settle the Manor of *Great Bentley* to the use of himself for life, with a Re-

[p] See Glenorchy v. Bosville, For. 19. S. C. MS. Stamford v. Hobart, 1 Bro. P. C. 288. Roberts v. Dixwell, 1 Atk. 607. Sperling v. Toll, 1 Ves. 70.

[q] 1 P. Wms. 753. S. C. MS.

[r] 2 P. Wms. 478. S. C. MS.

[s] 1 Fonbl. Treat. Eq. p. 403. Fearne on Remainders, 146. last edition.

mainder to his first Son in Tail, and upon this the Counsel for the Defendant *gave up the first point* as to the Estate of *Great Bentley;* and the only question which remained for the Chancellor to determine was, what Estate the Plaintiff was to have, in the Lands to be purchased, with the moiety of the Father's personal Estate? What the Chancellor said is stated in the MS. Report, alluded to, as follows: "Lord Chancellor—An Estate to one for Life, with a Remainder to the Heirs of his body, is, in Law, an Estate in Tail; and if a Man has made a Will we cannot controul him and say he ought to have made it otherwise. I am inclined to think this an Estate in Tail, but if you will, you shall have a case made for the opinion of the Judges;" but that, the Counsel for the Defendants objected to, so it stood over till the next day; when the Chancellor continued of the same opinion as to the Letter of the Will; but said, "as the Intent of *S. Papillon* was plainly that it should be an Estate for Life in his Son, and as they now come for aid from this Court, we ought to tie them down to what was intended by the Donor: so decreed that his Trustees should find out a Purchase as soon as they could, and that it should be conveyed to the Plaintiff for his Life, Remainder to Trustees to preserve, &c. with Remainder to his first Son, &c."

It is very plain, therefore, that no *decision* was made upon the appeal in regard to that part of the devise which was a *Trust executed*, but only on

that part of the devise which was *executory*, and cannot, therefore, properly be cited, as a decision, establishing the distinction between Trusts executed, and Executory Trusts. That distinction, however, is fully established in the various cases before alluded to, as well as in others, that may be mentioned.

The decisions in these cases, of Executory Trusts, do not arise, *Lord Hardwicke* says, from the Courts' making a different construction upon a trust, than upon a legal Estate, but that some circumstance in the will has induced the Court to make a narrower construction [a].

The cases have been where some clause repugnant to the nature of an Estate Tail, shewed the Donor intended only an Estate for Life. An Estate granted or given by will to *A.* for Life, and to the Heirs of the body of A., by the Common Law, and the well known rule in *Shelley's case* [b], gives an Estate Tail, and the same Rule prevails with respect to Trust Estates; but where the Testator by his Will *directs his Trustees to convey* to *A.* for Life, and to the Heirs of the body of *A.*, the Trust is considered as *Executory*, on account of the direction to the Trustees to *convey*, and in such case the Court directs how the Party shall convey, and considers the intention of the Testator, and orders the conveyance according to the form

[a] Roberts v. Dixwell, 1 Atk. 609.

[b] 1 Co. 93.

and method of conveyancing[c]; and so as not to let it be in the power of the first taker to destroy the Contingent Remainders[d]. And where lands were directed *to be settled* on *A.* and the Heirs of his body, with a proviso that it should not be in his power to dock the entail, a strict settlement was decreed[e].

So, where Lands were directed *to be conveyed* to *A.* for Life, with remainder to the issue of her body, a strict settlement was decreed[f].

Wherever, indeed, *in a Will*, the Testator has directed his Trustees in whom the legal Estate is vested to *convey*, *&c.* this is an *executory Trust*, and the Court, as in cases of *Marriage Articles*, has it in its power, to mould the conveyance so, as best to answer the intent of the Testator[g]; but in all these cases, the intention of the Testator must appear expressly or impliedly from expressions in the Will[h].

A mere direction to convey an Estate to *A.* and the Heirs of his Body, will entitle *A.* to a conveyance to him, of an Estate Tail[i].

In Wills[k], as in Marriage Articles[l], cross Remainders may be raised by implication.

[c] See Roberts and Dixwell, 1 Atk. 607.

[d] Baskerville v. Baskerville, 2 Atk. 279.

[e] Leonard v. Earl of Sussex, 2 Vern. 526.

[f] Glenorchy v. Bosville, Forrester 3. S. C. MS.; and see Sir J. Stamford v. Hobart, 1 Bro. P. C. 288.

[g] Marryat v. Townley, 1 Ves. 130.

[h] Stanley v. Stanley, 16 Ves. 491.

Legate v. Sewell, 1 P. Wms. 87. Bale v. Coleman, 1 P. Wms. 142.

[k] Marryat v. Townley, 1 Ves. 102, 104. Green v. Stevens, 12 Ves. 419. 17 Ves. 64.

[l] Twisden v. Lock, Ambl. 663; and see 17 Ves. 67.

In all cases where the Testator has directed Money to be laid out in Land, it is not material whether he has used any technical terms: if there be a clear intention, the Court will execute that intention, by correcting, adding, or altering the sense. The only question where the Court is to be the Conveyancer, is, whether the Intention of the Testator be against any rule of Law, as to create a perpetuity; but if the Intention be according to the Rule of Law, it will give it effect[m].

The distinction between *Trusts executed* and *Executory Trusts*, is, as we have seen, fully established in a variety of cases; but *Lord Hardwicke*, in his decision in *Bagshaw and Spencer*, is supposed to have denied that there was any distinction between them; and is thought to have placed them on the same footing, by declaring that, "*all Trusts are executory.*"

By this observation, it is apprehended, *Lord Hardwicke* did not mean to deny, however strongly and justly he may have disapproved, the distinction in Equity between those cases where the Estates are *finally* limited by the Will itself, without any kind of reference to any further execution of them, by a conveyance directed by such Will, and those cases, where the Will is only directory, and prescribes the intended limitations of some future conveyance, or settlement, directed by the

[m] Browne against De Laet, 4 Bro. C. C. 535.

will to be made for the effectuating them; but that all he unequivocally and expressly denied, was the *propriety of terming* the former class of cases, "*Trusts executed.*" It was the complaint of a Logician.

The remark of *Lord Hardwicke* was not a new, nor a hasty, off-hand notion, then, for the first time entertained by the Chancellor. So long as ten years before, in the case of *Hopkins and Hopkins*[n], according to the Report in *Atkins*, he had expressed a similar opinion. Besides, too, there was owing to the Trial of the Rebels near an interval of three years, between the hearing and the decision in *Bagshaw and Spencer*. Indeed, in one of the MS. Reports of this case, with which the Author has been favoured, his Lordship prefaces his Judgment with an apology for the length of time it had been depending. It may therefore be fairly concluded, that this part of the case was maturely and anxiously considered. If there was error, it was not casually, or hastily adopted, but fallen into, after an almost unprecedented length of deliberation.

According to *Atkyns's* Report of *Hopkins and Hopkins*, the Chancellor is reported to have said, "a distinction was taken between those cases and the present, that they were cases of extraordinary Trusts, where the Will itself directed a Conveyance, and where there is no Conveyance directed, but the Trust only declared by the Will. I ad-

[n] 1 Atk. 580.

mit the Court has thrown out such sort of expressions, but I think there is no difference, *all Trusts are executory*, and whether a Conveyance be directed by the Will or not, this Court must decree one, when asked at a proper time, but *I do not give any conclusive opinion to oust that distinction.*" The case of *Hopkins and Hopkins* has had its general correctness justly impeached by the late *Earl of Rosslyn;* but there is no reason to suppose it incorrect as to the passage quoted. The Author has in his possession, a very excellent note of that case; but certainly neither in that note, nor in the report of the case by *Forrester*[o], is any thing to be found, like the marked observation upon Trusts executed and executory, as is given in the Report of *Atkins.* But it seems highly probable, that *Lord Hardwicke* did use the language attributed to him; for in the case alluded to of *Bagshaw and Spencer*, a case so long subsequent to *Hopkins and Hopkins*, and of which there are many Reports[p] in print and in manuscript, he lays down a doctrine every way consistent with that, which he had promulged in *Hopkins and Hopkins.* His words are—"*All Trusts are in the notion of Law executory, and are to be executed in this Court. At Law, before the Statute of Uses, every use was a Trust, then the Statute executed the legal Estate, and joined it to the use, and therefore a Trust executed is a Legal Estate; and to bring it to a Trust in Equity, the legal Estate must want to*

[o] Cas. Temp. Talbot, p. 44.

[p] The best report of this case is in 1 Vol. Collectanea Juridica, 413.

be executed by a Conveyance." A doctrine so plainly and explicitly delivered, seemed only to require to be stated, in order to be understood, and to carry conviction.

The true objection of *Lord Hardwicke* was to the *propriety of the term* which as a Logician and a Scholar seemed to him unwarranted and inaccurate, and as leading to confuse a subject, already sufficiently intricate. It was to this *classification* of Trusts he so justly objected. He altered no Law, he shook no decisions, as some seem to have thought, and have seriously, but undeservedly objected to him. In fact, as the Term "Trust executed" had crept into general parlance, and as the phrase was convenient in argument, however wrong in its original introduction, so we find *Lord Hardwicke* (to the great astonishment of many who have misinterpreted his sentiments) using the same term in cases anterior, as well as subsequent to the case of *Bagshaw and Spencer*, where he had so clearly evinced the impropriety of the term, though always accompanying the use of it, with words expressive of the inexactness of its first introduction.

Lord Mansfield, so long the pride and glory of his country, on more than one occasion, countenanced *Lord Hardwicke's* proposition, and distinctly expressed his concurrence with *Lord Hardwicke*. In the celebrated case of *Perrin and Blake*, his Lordship upon the first *argument* observed, that the distinction *between Trusts executed and*

Trusts executory was not *founded in sense.* He observes, " it is absolutely necessary, to the very existence of a Trust that it be executory, because a Trust executed is within the Statute of Uses. And this," says he, " *Lord Hardwicke* particularly remarks in *Bagshaw and Spencer.*" It is thus, he calls in the aid of *Lord Hardwicke's* opinion to sanction his own, gives credit to that opinion, and delivers his own without the least symptom of doubt or hesitation. In his *Judgment* in *Perrin and Blake*[a], he observes, that he argued *Bagshaw and Spencer* in every stage of it. Thus interested as he must have been, and anxious and certainly well able, to sift every part of the Judgment of *Lord Hardwicke* in that case, afterwards in *February* 1769, elevated as he had recently been, to the distinguished situation of Lord Chief Justice, with the eyes of all upon him, a period of upwards of twenty years after the decision in *Bagshaw and Spencer,* he confirms, in the strongest language, the doctrine of *Lord Hardwicke.* But this is not all : in a subsequent case of *Long and Laming*[b], his Lordship reiterates the opinion, and observes, " *there was no solidity in the distinction, all Trusts are executory.*" Thus again adhering to the very words of *Lord Hardwicke*, and further observing upon Trusts, in conformity with the Chancellor, " they are to be executed by a Conveyance, and the Parties have a right to apply to a Court of Equity for such Conveyance."

[a] 1 Vol. Collectanea Juridica, 318.

[b] 2 Burr. 1108.

With respect therefore to the distinction between Trusts executed and Trusts executory, the opinion of *Lord Mansfield* was in exact conformity with that of *Lord Hardwicke;* their very phraseology almost tallies. If *Lord Mansfield* so far misunderstood *Lord Hardwicke* as to suppose that the Chancellor not only repudiated the term, *Trust executed,* but also the cases and distinctions to which that Term was applied, he certainly went far beyond the meaning of *Lord Hardwicke.*

After so plain, and so studied an exposure of the impropriety of the distinction between what have been called Trusts executed, and Trusts executory, proceeding too, from Characters so eminent, from as great a Chancellor, and as great a Chief Justice as ever adorned this country, both of whose great abilities and virtues were so nicely matched, that more than once the late *Lord Chief Justice Kenyon* protested, "he hardly knew which to think was the greater man," it might have been imagined that the supposed propriety, or the supposed necessity of the term *Trust executed,* would hardly once again have been vindicated. It has, however, found its supporters, and amongst the most formidable of these we may rank the late able and ingenious *Mr. Fearne,* who is indeed *ipse agmen,* and who has devoted many a page of his profound and incomparable Essay on Contingent Remainders, to a long and elaborate exposure of what he considers to be the erroneous doctrine of *Lord Hardwicke.* According to *Mr.*

Fearne[c], a Trust executed, is where the Trust is directly and wholly declared by the Testator to attach on the Lands immediately under the Will itself, that is, where the Estates are finally limited by the Will itself, without any kind of reference to any further execution of them, by a Conveyance directed by that Will; and he describes Executory Trusts, as being those which are only directory, or prescribe the intended limitations of some future Conveyance or Settlement, directed by the Will to be made, for the effectuating them. According to this mode of arguing, *Mr. Fearne* affixes a very different idea to the term "Trust executed," to what *Lord Hardwicke* and *Lord Mansfield* affixed to it. By the term "Trust executed," they meant legal Estates become such by the Statute of Uses, where no subsequent Conveyance was necessary; and to such an Estate they thought the term "Trust executed," exclusively applicable. The words of *Lord Hardwicke* in *Bagshaw and Spencer*, are expressly to this effect, "a Trust executed is a legal Estate;" and the words of *Lord Mansfield*, in *Perrin and Blake*, are to a similar effect. "A Trust executed is within the Statute of Uses, or in other words is a legal Estate." We must particularly observe, that neither in a Trust executed, nor a Trust executory, according to *Mr. Fearne's* definition of it, is the legal and equita-

[c] Contingent Remainders, 4th Edition, p. 217. etc.

ble Estate united; for in both those Trusts as described by him, a Conveyance by the Trustees would be necessary to give the legal Estate to the Cestui que Trust: so that whether a Conveyance were directed by the Will or not, the Court of Chancery must decree one at a proper time, as *Lord Hardwicke* observed in *Hopkins and Hopkins;* and a Conveyance being in both cases to be made, the Trust, the Chancellor rightly considered as in all cases executory. "One essential part of the Trust is, that the Trustee is to convey the Estate at some time or other; sometimes it is to be done sooner, and sometimes later; and this whether the Testator has directed it or not, and so much every Testator is presumed to know. One may therefore *reasonably doubt*, how it can make any substantial difference, whether the Testator has in words directed a Conveyance or not: since the law, that is, the course of the Court, takes notice, that the Testator could not intend his Estate should always remain in the Trustees, but that one principal confidence reposed in them is to convey[d]. The propriety of the distinctions couched under the terms Trust executed and executory, was always *doubted* of by *Lord Hardwicke;* but the denomination *Trust executed*, he was *clear* was bad.

But, says *Mr. Fearne*, *Lord Hardwicke negatived* the idea that by Trusts executed he meant

[d] 1 Collectanea Juridica, 413.

legal Estates, or Uses executed; and then by inferences somewhat forced, and by what may be fairly termed, a torture of words, he cites some expressions from *Roberts and Dixwell*, a Case *anterior* to *Bagshaw and Spencer*, from which he insists that *Lord Hardwicke* did not *mean what he said* in *Bagshaw and Spencer;* for that must really be the Case, if we do but consider how explicit the opinion of *Lord Hardwicke* is in *Bagshaw and Spencer*, as to his idea of what was styled a Trust executed. *Mr. Fearne's* words are these, "as *Lord Hardwicke* did not expressly draw the line between Trusts executed and executory, it may possibly be suggested, that he ranked all Trusts under the description of executory, and meant by Trusts executed, legal Estates or Uses executed." Can there be a doubt of it? What *Mr. Fearne* considers as a possible suggestion of the reader, was as plain as words could speak, the very point which *Lord Hardwicke* laboured so much to support, and in which he was seconded by *Lord Mansfield*. *Mr. Fearne* continues, "we are to remember he in fact negatived any such conclusion, when he said in *Roberts* and *Dixwell*, to be sure where an Estate has been granted or given by Will to A. for life, and to the Heirs of the body of A. such a devise has been by the Common Law united so in the first person, as to convey to him an Estate Tail; that the same construction, too, had prevailed in Trust Estates; but in the Case before him he said, "there were all sorts of Trusts, &c. but the latter part of the

Trust was *merely executory.*" Now here, says *Mr. Fearne*, he expressly distinguished between legal Estates and Trusts in general, and between several sorts of Trusts; but therefore in terming one sort of Trust executory, he recognised a distinction between that and other Trusts that were not so, and clearly pointed out the nature of that distinction by saying, the Trust in question was merely executory, and to be carried into execution, and referring to the very cases in which the line of distinction between Trusts executory and executed. had been explicitly and clearly drawn. How it was that *Mr. Fearne* could promulge sentiments such as these, it is difficult to divine. After *Lord Hardwicke* had observed so explicitly in *Bagshaw and Spencer* that "all Trusts are executory," and "that a Trust executed was a legal Estate," how could it be possible to doubt his meaning? How was it possible to suppose, as *Mr. Fearne* has supposed, that *Lord Hardwicke* did not mean to rank all Trusts under the description of executory, nor mean by Trusts executed, legal Estates or Uses executed?

The Case of *Roberts and Dixwell* seems by no means to affix to the phrase "*Trust executed*" that sort of sanction for which *Mr. Fearne* so strenuously contends. It may be proper to give the passage at full length, and thus enable the reader more correctly to form his Judgment respecting the true and natural import of what *Lord Hardwicke* has said. "To be sure where an Estate has been given or granted to A. for life,

and to the Heirs of the body of A. such a devise has been by the Common Law so united in the first person as to convey to him an Estate Tail ; the same construction too has prevailed with respect to Trust Estates. But in the present case here are all sorts of Trusts, as to mortgage, sell, &c. but the latter part of the Trust is merely executory, to be carried into execution after the performance of the antecedent Trusts ; the whole direction therefore falls upon this Court, and they are to direct how the Parties are to convey. This Court have taken much greater liberties in the construction of executory Trusts, than where the Trusts are actually executed." It cannot be denied that *Lord Hardwicke* has used in this Case the terms *Trusts executed* and *Trusts executory*, and in the sense which *Mr. Fearne* affixes to them ; but it must be allowed to deny that, the *propriety of the terms*, are any way established by that Case. *Lord Hardwicke* thought the phrase *Trust executed* improper ; but as it had crept into usage with the profession, and as it was only a quarrel with the propriety of the name, and whether so denominated or not, it did not affect the substance of any of the decisions. He has more than once used the term, not only in the Case of *Roberts and Dixwell,* and *Baskerville and Baskerville*, as mentioned by *Mr. Fearne*, but also in *Exell and Wallace* [c], which is not alluded to by *Mr. Fearne* ; but in this latter case he pointedly

[c] 2 Ves. 223.

shews his continued distaste of the term, by the marked phrases, "*what is called, a Trust executed*," "*making it executed, as it is called*," expressions which do very sufficiently testify his rooted dislike to the term, the denomination, *Trust executed;* a dislike first promulged, as before observed in *Hopkins and Hopkins*, (a Case to which *Mr. Fearne* does not allude,) and most zealously adhered to in his solemn, deliberate Judgment in *Bagshaw and Spencer*, a Case very long subsequent to *Roberts and Dixwell*, and *Baskerville and Baskerville*, so much relied upon by *Mr. Fearne*.

It was never doubted by *Lord Hardwicke* but that there were some sort of Trusts so created, that the Court, following Precedents, *would not* interfere with them in a discretionary manner, by carrying them into execution, and that there were others, with which the Court would interfere, or carry into execution, according to the apparent intent of the Party: on the contrary, he has often acted upon such a distinction, though he disapproved of it, and would not have adopted it, if it had not been fortified with Decisions; but to say that the former sort of Trusts should be denominated *Trusts executed*, and the latter kind, *Trusts executory*, seemed to him, giving improper names to things, and engendering a confusion of Terms. Who can write more forcibly than *Mr. Fearne* himself has written upon this head? No complaining Logician has ever made a better

remark. "A confusion of Terms[f] in any science tends to confound the science itself, by destroying that precision of ideas, that distinction among its objects, which is the very ground-work of all knowledge. "*Nomina si perdas certe distinctio rerum perditur.*" According to Mr. *Fearne*, there must be *two sorts* of Trusts executed; Trusts executed at Law by the Statute of Uses, and Trusts executed in Chancery, which appears to be incurring that sort of censure for confusion of terms which *Mr. Fearne* has so well inveighed against in others. Can any other instance be given where Lawyers have applied the same term to express two very different things? Does any other science afford such an instance?

The Cases of the *Earl of Stamford* v. *Sir John Hobart*, *Papillon and Voice*, and *Lord Glenorchy and Bosville*, have before been referred to. The first and last establish the position already alluded to, and which may be repeated, that there are some Trusts, as for instance, where a Conveyance is directed by the Will, in which the Court will interfere and decree an execution of such Trust, according to the intent and meaning of it; and that there are other Trusts, such as where no Conveyance is directed, but where the Trusts are fully limited and declared by the Instrument creating the Trust, in which the Court will not interfere; but does it follow from hence that the one ought properly to be termed Trusts executory, and the

[f] See Collectanea Jurid. 1 Vol. p. 238.

other, Trusts executed? for really, all the question with *Lord Hardwicke* was, as to the propriety of the name. He did not say, the above mentioned decisions were bad, but though not satisfactory, he felt the necessity of abiding by them, and uniformly acted upon them: he only objected to the *term* Trust executed, used in the discussion of those and other Cases, and which he considered as an improper expression, because it had been previously appropriated.

In *Exell* and *Wallace*[w], before adverted to, *Lord Hardwicke* says, in allusion to *Bagshaw and Spencer*, "I did not there say no weight was to be laid upon the distinction" (between Trusts executed and executory;) "but that if it had come recently before me, I should then have thought there was little weight in it; but that I should have that deference for my predecessors, as not to lay it out of the case; not intending to say, that all which my predecessors did, was wrong founded, which I desire may be remembered."

Ought *Mr. Fearne* to have omitted this important passage? Is it not destructive of his Imputation? Does it not shew the consistency of *Lord Hardwicke* in his opinion, and his submission, reluctant, undoubtedly, to the authorities? Where then was his Error?

In this attempted vindication of *Lord Hardwicke*, a deviation has been made from the plan prescribed by the Author in this Work, of stating the Decisions, without commenting upon them; but

[w] 2 Ves. 323.

feeling an extreme veneration for the character of *Lord Hardwicke*, it seemed a sort of duty to endeavour to rescue his judicial character from what appeared to be an unwarranted imputation of a serious Error; and it is satisfactory to think, that in the way in which the subject is now considered, all the Decisions, instead of being jarring and dissonant, are quite reconciled; or if *Bagshaw and Spencer* must be considered as an exception, and that the expressions of the Will in that Case, did not bring it within the doctrine, as to executory Trusts, the Decision must be viewed as "an anomalous Case," as Mr. *Fearne* terms it, or at most, a wrong conclusion from right Principles; and that *Lord Hardwicke* improperly considered it, as a case falling within the rules applied to executory Trusts; for that he considered it as an executory Case, seems to be exceedingly clear.

There is a wise observation of Lord *Coke*, which Mr. *Fearne*, most able as he was, would have done well to remember. "Note, Reader," says he; "the office of an Interpreter is to make such construction, not only that one and the same author be not against himself, but also that the Resolutions or Judgments reported in one book, be not by any literal interpretation expounded against any Resolution or Judgment reported in any other, but that all *si fieri possit*, may stand together[y]."

[y] 3 Rep. 84[b].

Under this Head of Executory Trusts, Devises for the Payment of Debts are classable; but as such Devises are connected with the doctrine respecting the administration of Assets, it will be more conveniently considered, as a part of that subject.

We shall now treat of *Implied Trusts:* under which head may be classed, the doctrine as to 1. *The Administration of Assetts;* and 2. *Legacies;* for Executors and Administrators if not expressly Trustees in regard to the payment of debts and Legacies, and the other duties of their office, are impliedly so in the construction of a Court of Equity. We shall afterwards consider, 3. That species of implied Trusts which arise from purchases made *in the name of a third Person;* and 4. *Resulting Trusts.*

The whole Jurisdiction of Courts of Equity in the Administration of Assets is founded on the principle, that it is the duty of the Court to enforce the execution of Trusts, and that the Executor or Administrator who has the Property in his hands, is bound to apply that Property in the payment of Debts and Legacies, and the remainder according to the Will, or, in case of Intestacy according to the Statute of Distributions. The sole ground on which Courts of Equity proceed in Cases of this kind, is *the Execution of a Trust*[a].

[a] Adair v. Shaw, 1 Sch. and Lefr. 262; and see 2 P. Wms. 211, 161. Elliott v. Collier, 1 Ves. 16. S. C, 3 Atk. 527. Hovey v. Blakeman, 4 Ves. 607. Ripley v. Waterworth, 7 Ves. 452; and see 7 Ves. 197.

It is plain that Executors or Administrators have not any legal or beneficial Interest in the Personal Estate, but are vested only with a legal Power over it, just as every Trustee has a legal Power over his Trust Property [b]. It will not pass under general words in a grant of their Property [c]; it is not liable for their debts either on an Execution [d], or Bankruptcy [e]; nor (unless under particular circumstances) vests in the Husband of a Feme Executrix or Administratrix [f]; nor is it forfeitable by their Crimes [g]. If they had any legal or beneficial Interest in the Personal Estate, they would have a power of bequeathing it by Will, but this they have not; nor does it go to their Executors or Administrators [h]; but to the Administrator *de bonis non* of the first Testator [i].

The doctrines as to the administration of Assets are clearly settled; but as Lord *Hardwicke* even in his time observed, "points with regard to Assets are numerous enough [k]." It seems, however, that the right of the Court to decree a distribution of Assets was not fully settled till about the time of the Lord *Keeper North*, who overruled a Demurrer to a Bill for that purpose [l]; as did also his Successor, Lord *Jefferies*, in a Case where a Bill was filed

[b] Duke of Rutland v. Dutchess of Rutland, 2 P. Wms. 211; and see Humphrey v. Bullen, 1 Atk. 458.
[c] Lord Raym. 1307.
[d] Farr and Newman, 4 T. R. 621.
[e] 1 Atk. 158.
[f] Quick v. Staines, 1 Bos. and Pul. 293.
[g] Off. Exec.
[h] Lloyd v. Stoddart, Ambl. 152.
[i] Ib.
[k] Smith v. Hoskins, 3 Atk. 387.
[l] Howard v. Howard, 1 Vern. 134.

by an Executor against a Creditor to take an Account of Assets, and settle the priorities of Creditors, which was demurred to as multifarious; but the Demurrer was overruled, and the Bill not only held to be proper, but a safe way for an Executor to take[m]. From that time such Suits became frequent, and it has been held that an Account may be decreed of an Intestate's personal Estate, notwithstanding an Account before taken, and a distribution decreed in the Spiritual Court[n].

After a Suit for an Account of Assets is instituted against an Executor in a Court of Equity, he has not been allowed payments *voluntarily* made without Suit[o]; and it has also been holden, that a Judgment confessed by an Executor, pending a Bill in Equity, shall not be allowed upon an Account of Assets[p]. Certainly, debts paid by an Executor or Administrator after a *decree* to account, will not be allowed[q], though in such case they are permitted to stand in the place of the Creditors so paid[r].

If there be two Creditors, and one files a Bill before the other, and obtains a final Decree, and a Report of the Master, and that Report has been confirmed; and then the other brings a Bill, and obtains a final decree, and his demand is con-

[m] Buckle v. Atles, 2 Vern. 37.

[n] Bissell v. Axtell, 2 Vern. 47.

[o] Bright v. Woodward, 1 Vern. 360. S. P. 2 Ch. Cas. 201. Darston v. Earl of Oxford, Prec. Ch. 188. Joseph v. Mott, Prec. Ch. 79.

[p] Surrey v. Smalley, 1 Vern. 457; but see Goodfellow v. Burchett, 2 Vern. 299.

[q] 10 Ves. 34.

[r] Jones v. Jukes, 2 Ves. jun. 518.

firmed, the Executor must pay him first who used the first diligence.

If a *Decree* be obtained on a Creditor's Bill[s] for the Administration of Assets, and some of the Creditors sue at Law, the Court will interpose, by Injunction, to restrain them; but until *a Decree* is obtained, no Injunction can issue[t]. If *before a Decree* obtained, several Creditors proceed by different Bills in Equity, for satisfaction of their demands, the Court will not stop the Suits, because of the priority which may be gained; although this creates an intanglement and difficulty upon the Estate; but *after a Decree* obtained, an Injunction would be granted, because the Executor could not plead it at Law[v].

When a *Bond Creditor* files a Bill on behalf of himself and others, or for his own particular debt, the course of the Court is, to direct an Account of *all* the Bond Debts of the Testator or Intestate, with liberty to come for a satisfaction; and in such Case, the Court will not after a Decree for a Sale, suffer another Bond Creditor, who has obtained Judgment, to proceed against the Estate[w].

If the Court on the Bill of a Bond Creditor decrees a Sale, in which the Heir joins, and another Bond Creditor brings an Action at Law to have satisfaction out of it, upon his pleading *riens per descent*, he will be charged with the Sum of Money for which the Estate sold, he having

[s] Ashley v. Pocock, 3 Atk. 208.
[t] Martin v. Martin, 1 Ves. 213.
[v] Martin v. Martin, 1 Ves. 213.
[w] Ib. 214.

joined in the Conveyance; nor would the Common Law Court take notice that it was done by a Sale of Equity; but upon a Bill by the Heir at Law, he would have an Injunction[x].

If Creditors omit to file a Bill against a Devisee in Trust of Lands, to compel a Sale, they will not be allowed to disturb a fair purchaser who has been in quiet possession, for a length of time, sixteen years, for instance, of the Trust Estate[y].

The *payment of debts* is the leading duty of an Executor. The *order* in which Assets are administered, and the question, what is a good legal debt, are pure questions of Law, the consideration of which is not within the plan of this Work. No question that can arise as to such debts in the administration of legal Assets is determined in a Court of Equity, until it is first ascertained whether the debt be good at Law; and if the Court has a doubt, the Bill is retained with liberty to the Plaintiff to proceed at Law[z]: on this head, therefore, it is only necessary to make a few observations.

An Executor or Administrator may, as against Creditors of equal degree, retain out of the Assets, a debt due to himself, and also a debt due in *Trust* for himself[a]. And though the Administrator die before he appropriates the Assets in the Payment

[x] Martin v. Martin, 1 Ves. 214.

[y] Elliott v. Merriman, 2 Atk. 43. S. C. Barn. 78.

[z] Hartwell v. Hartwell, 4 Ves. 815.

[a] Cockroft v. Black, 2 P. Wms. 298. Weeks v. Gore, 3 P. Wms. 184. in note B.

of his debt, yet his Executor is entitled[b]; but an Executor of an Executor cannot, it seems, retain[c]. It seems doubtful, whether an Heir being a Creditor by Bond or Judgment, may, like an Executor, retain[d].

It is observable, also, that at *Law*, if a Creditor appoints his Debtor, Executor, the Debt is extinguished and cannot be revived[e]; but in Equity, the Executor is as to Creditors and Legatees, on a deficiency of Assets[f], considered as a *Trustee* in respect of the Debt, and accountable for it, as part of the Testator's Personal Estate[g]. Nor is he entitled to retain his debt, if the Testator bequeaths away "all his debts[h];" for the implied gift, by making the Debtor Executor, may be controuled by an express bequest of the debt[i].

In regard to the payment of debts, there is an anomalous Case which may be mentioned, founded on what has been called, a *subtle Equity*, and it is this. If an Annuity be secured by Bond in bar of Dower, the Widow is entitled to be paid, in the first place, out of the Personal Estate,

[b] 3 P. Wms. 184. in note [b].

[c] Vid. Hopton v. Dryden, Prec. Ch. p. 180. See Croft v. Pyke, 3 P. Wms. 183. where point discussed but not decided.

[d] Jolley v. Gower, 2 Vern. 62.

[e] Hudson v. Hudson, 1 Atk. 461. Fox v. Fox, 1 Atk. 463. Wankford v. Wankford, 1 Salk. 299; but see Phillips v. Phillips, 2 Freem. 11.

[f] Phillips v. Phillips, Yelv. 160. S. C. 2 Freem. 11; and see Browne and Selwyn, For. 242. S. C. MS.

[g] Fox v. Fox, 1 Atk. 463. Cary v. Goodinge, 3 Bro. C. C. 110; and see Vin. Abr. vol. S. p. 198.

[h] Browne v. Selwyn, For. 242. S. C. M. S.

[i] Ib.

and in aid of that is entitled to come upon such Real Estate, as would have been *liable to Dower*[k].

Where a Wife's Estate is Mortgaged, *for the benefit of the Husband*, she has, if she survives, a right, after all his debts are paid, to stand as a Creditor against his Assets[l], (unless at the time of the Mortgage a Settlement is made on the Wife[m];) but evidence is admissible to shew that the Wife intended otherwise. The Title of the Wife to be exonerated, is considered as precisely the same with that of the Heir[n]. If the Mortgage of the Wife's Estate is not for the Husband's debts, or for debts due from the Wife *dum sola*[o], his Assets though he join in the Mortgage are not liable[p]. And where the Wife has the absolute disposal of the Money, and appropriates it to the use of the Husband, the Husband's Assets are not liable[q].

On the same principle, if a Father, Tenant for Life, and his Son, join in raising Money, which is received by the Father, he is bound to exonerate the Son's Estate from the Incumbrance[r].

Where Husband and Wife live together, she is

[k] Tew v. Earl of Winterton, 1 Ves. jun. 451. S. C. 3 Bro. C. C. 489.

[l] Tate v. Austin, 1 P. Wms. 264. S. C. 2 Vern. 689. S. C. on Appeal, 1 Bro. P. C. 1. see Parteriche v. Powlet, 2 Atk. 384. and Ingledon v. Northcote, 3 Atk. 436. and Lewis against Nangle, Ambl. 150.

[m] Lewis v. Nangle, Ambl. 150.

[n] Clinton against Hooper, 3 Bro. C. C. 201. S. C. 1 Ves. jun. 173.

[o] Lewis v. Nangle, Ambl. 150.

[p] Bagot v. Oughton, 1 P. Wms. 347. S. C. Fortescue, 332. Mod. Cas. 249, 381; and see Clinton against Hooper, 3 Bro. C. C. 211. S. C. 1 Ves. jun. 188.

[q] Clinton v. Hooper, 3 Bro. Ch. Ca. 213.

[r] Piers v. Piers, 1 Ves. 522.

not entitled to an Account of her separate Estate against his Creditor and Assignee, nor against his Representative, any farther back than from the *death* of the Husband[s], unless he promised to pay the arrears[t].

With respect to *Assets* they are either real or personal, and legal or Equitable. *Legal Assets* are such as constitute the Fund for the payment of debts according to their legal priority. *Equitable Assets* are such as can be reached only by the Aid of a Court of Equity, and are divisible, *pari passu*, among all the Creditors. Every thing may be considered as equitable Assets, which the Debtor has made subject to his debts generally, and which, without his Act, would not have been subject to his debts generally[v]. Equitable Assets in the hands of an Executor are in some respects applied as legal Assets are: as, first to pay debts and then Legacies[w]; but they are different in this, that all the Creditors take proportionably, and not in a course of administration, as in the case of legal Assets[x]. And where a Testator lets in Creditors by a *charge*, it is now settled, whatever doubts may formerly have been entertained, that Creditors are to be paid in preference to Legatees[y].

[s] See Smith v. Lord Camelford, 2 Ves. jun. 716. Dalbiac and Dalbiac, 16 Ves. 126; and see Parkes and White, 11 Ves. 225. and Squire against Dean, 4 Bro. C. C. 326; but see Parker v. Brookes, 9 Ves. 588.

[t] Ridout v. Lewis, 1 Atk. 269.

[v] 2 Fonbl. Eq. 398. in note.

[w] Hixon v. Witham, 1 Vern. 482. Walker v. Meager, 2 P. Wms. 552. S. C. Mos. 204. Maylin v. Hoper, Cas. Temp. Hardw. 206. contra Gosling v. Dorney, 1 Vern. 482.

[x] Solley v. Gower, 2 Vern. 62.

[y] Kidney v. Coussmaker, 12 Ves. 155.

The ordinary Administration of real and personal Assets, in the payment of *specialty debts*, is in the following order.

1. *Personal Estate*, not specifically bequeathed or exempted expressly, or by plain indication [z], from the payment of debts.

2. *Land expressly devised* for (not merely charged with) the payment of debts [a].

3. *Descended Estates* [b].

4. *Lands charged* with the payment of debts [c].

The same administration of the assets is made in the payment of *simple contract* debts, except that, as to them, descended Estates are not liable, unless in those cases where the deceased Debtor was a Trader according to the acceptation of that word in the Bankrupt Laws [d].

The *personal Estate*, is the fund first liable to the payment of debts, and is often called, "the natural fund;" nor can a Testator, as against his Creditors, exempt the personal Estate; but the Testator may, if he pleases, give his personal Estate as against his Heir, or any other Representative, clear of the payment of his debts [e]; but in order so to exonerate the personal Estate from the payment of debts, the Will must contain express

[z] Samwell and Wake, 1 Bro. C. C. 145. 1 Bro. C. C. 58. Davis v. Topp, 1 Bro. C. C. 526. S. C. 2 Bro. C. C. 259 in note; and see 1 Bro. C. C. 58.

[a] 1 Bro. C. C. 528.

[b] Ib.

[c] Vid. Harmood v. Oglander, 8 Ves. 124, 5; and see Davis and Jopp, 1 Bro. 524. Donne against Lewis, 2 Bro. C. C. 263. Manning and Spooner, 3 Ves. 117. Milner v. Slater, 8 Ves. 306.

[d] See Stat. 13 Eliz. c. 7. s. 11.—1 Jac. 1. c. 15. s. 17.

[e] Walker v. Jackson, 2 Atk. 624. Bridgman and Dove, 3 Atk. 202. Attorney Gen. and Downing, Ambl. 572, 3.

words for that purpose, or, (a doctrine much lamented[f]) a plain manifested intent[g];—a declaration plain, or necessary inference, tantamount to express words[h]. It is impossible to express in definition, what circumstances will be sufficient to shew this intention; it must arise from the context of the Will[i]. It may be found, not merely in the mode in which the personal Estate is given, but also in the mode in which the real Estate is given, or the application directed to the payment of that debt; for the real Estate may be so appropriated to the payment of the debt, as to shew a clear intention that it shall not be a burthen upon any other Fund, though an intention to exonerate the personal Estate is not in any other way expressed[k].

A mere gift of the Personal Estate, does not exonerate it from the payment of debts[l], unless it be a specific gift[m], as, where there is a gift to a Wife of her Paraphernalia[n]; and though a Will

[f] See Ferreges v. Robinson, Bunb. 301. Ancaster against Mayer, 1 Bro. C. C. 462. Hancox v. Abbey, 11 Ves. 186.

[g] Ayliffe v. Murray, 2 Atk. 60. The first case proceeding on this principle seems to have been Stapleton v. Colville, For. 202. S. C. MS.

[h] Milles v. Slater, 8 Ves. 305; and see also Brydges v. Phillips, 6 Ves. 567. Read v. Litchfield, 3 Ves. 475. Brummell v. Prothero, 3 Ves. 111. Burton v. Knowlton, ib. 109. Tower v. Lord Rous, 18 Ves. 132. Lord Inchiquin against French, Ambl. 37.

[i] Ancaster against Mayer, 1 Bro. C. C. 460, 462. Tait v. Lord Northwick, 4 Ves. 823.

[k] 11 Ves. 186.

[l] Brummell v. Prothero, 3 Ves. 111. Phillips v. Phillips, 2 Bro. C. C. 273.

[m] Walker and Jackson, 2 Atk. 624. S. C. 1 Wils. 24; and see Bunb. 302. Ex parte Dennison, 3 Ves. 552.

[n] Boynton v. Packhurst, 1 Bro. C. C. 576.

shew a clear intent in favor of a Legatee to exonerate the personal Estate from the payment of a particular debt, yet, if by the death of the *Legatee* it lapses, the *next of kin* cannot insist on the exoneration, but it devolves in the ordinary way [o].

The mere nomination of an Executor, though under circumstances that would give to him beneficially the personal Estate, and not leave it distributable to the next of kin, will not have the same effect, as a distinct specific gift of it to an individual [p].

A Devise of real Estate to be sold for the payment of debts, however anxiously provided, does not exonerate the personal Estate [q]; for, as it is said, such a devise shews nothing more than an intention that all the debts shall be paid, and that the real Estate, if that is necessary, shall be applied; but a direction to apply a *particular portion* of the real Estate for the payment of one *particular debt*, will, it seems, exonerate the personal Estate as to that debt [r].

But though a Will shew a clear intent in favour of a Legatee to exonerate the personal Estate from the Payment of a particular debt, and by the

[o] Hale v. Cox, 3 Bro. C. C. 324.

[p] Grey v. Minnethorpe, 3 Ves. 106. Stapilton v. Colville, For. 202. S. C. MS.

[q] Tait v. Lord Northwick, 4 Ves. 816. Dolman and Weston, 1 Dick. 26. S. C. 2 Vern. 740. Prec. Ch. 456. contra Adams v. Merrick, Eq. Ca. Abr. 271. Bicknell v. Page, 2 Atk. 78.

[r] Hancox v. Abbey, 11 Ves. 186: and see Spurway v. Glynne, 9 Ves. 483. and Manghan v. Masson, 1 Ves. and Bea. 418.

death of the Legatee, the Legacy lapses, the *next of kin* cannot insist on the Exoneration, but it devolves in the ordinary way[a].

Where a Mortgage is made by a person who is owner of the Estate, and the Mortgagor covenants to pay and dies, though, as to the Mortgagee, the Land may be looked upon as the Security on which he relies, yet the Mortgage is considered as a general debt, and the Land only as a Security, and the personal Estate is applicable in its discharge[b]; and this, though there may be younger Children of the Mortgagor who may be no otherwise provided for[c]. The same Rule is applied also, in favour of the Devisee of the Estate[d], and of an Heir; but it would be otherwise, if any Creditors of the Testator would lose their debts by the Mortgage being paid out of the personal Assets[e].

If the Heir tells the Executor to pay the Legacies, and that he will not press him for the exoneration of his Estate, and the Executor pays upon that assurance, the Executor cannot be called upon afterwards, or the Legatees be obliged to refund[f].

If a man purchases an Estate, subject to a charge, and does no more than covenant with

[a] Hale v. Cox, 3 Bro. C. C. 324.

[b] Evelyn v. Evelyn, 2 P. Wms. 665. Lanoy v. Duke and Duchess of Athol, 2 Atk. 455. Robinson v. Geo, 1 Ves. 252.

[c] Bartholomew v. May, 2 Atk. 487.

[d] See contra as to Devisee Lovel v. Lancaster, 2 Vern. 183. but see Lord Hardwicke's remarks on that case, 2 Atk. 487. and see Forrester against Lord Leigh, Ambl. 173.

[e] 2 Atk. 487.

[f] Seal against Brownton, 3 Bro. C. C. 214. S. C. 1 Ves. jun. 185.

the Vendor, that he shall be indemnified, it does not become his own debt, to be paid out of his personal Estate, but it remains a charge upon the Estate, or rather a debt of his in respect of the Estate only; and if nothing more has been done to take it upon himself, the debt must be paid out of that Estate, and not out of his personal Estate [g].

So, if an Estate *descends* to one, subject to a Mortgage, although the Mortgage be afterwards assigned, and the Party to whom it descended, enter into a Covenant to pay the money borrowed, it will not bind his personal Estate [h]. The Covenant will be considered only as a *Security* [i].

But the Party may by his acts make it a debt of his own, if from such acts it can be necessarily inferred, that he meant to make it a debt of his own [k]; if the charge is part of the price, in such case the personal Estate is liable [l].

Suppose, a man makes a Contract, pledging both his real and personal Estate, the latter by a general obligation, and part or the whole of his real Estate, as a specific pledge by way of Mortgage; the Estate descends upon his Son as Heir at Law, and the personal Estate goes to the Executor; and the question is, who pays the

[g] Butler v. Butler, 5 Ves. 538. Tweddell v. Tweddell, 2 Bro. C. C. 101. 152. Woods v. Huntingford, 3 Ves. 131. Parsons v. Freeman, Amb. 115. Forrester against Lord Leigh, Ambl. 173. and see Earl of Oxford v. Lady Rodney, 14 Ves. 417.

[h] Earl of Tankerville against Fawcet, 2 Bro. C. C. 58.

[i] Evelyn v. Evelyn, 2 P. Wms. p. 664.

[k] Woods v. Huntingford, 3 Ves. 128.

[l] Billinghurst against Walker, 2 Bro. 608.

debt? It was a mixed debt of the Father, but the Son's only as owner of the collateral Pledge; and he has a right to call upon the personal Estate. Therefore, if a person succeeding to an Estate of that kind has done no act to adopt the debt, and make it his personal debt, his personal Estate is not liable; but if by his acts he has put himself so far in the place of his Ancestor, as to make the debt his own, that is understood to be the same, as if he was the original Mortgagor; but the Court has been extremely anxious not to make that inference, unless where it is perfectly clear and obvious: therefore, though the Mortgagee pressing for his money, the Heir is obliged to have a transfer of the Mortgage, and as no Assignee will take it without some personal Covenant, upon that transaction, he executes a Bond to the new Mortgagee, if he does it only for that purpose, not meaning to make himself more liable, it has been determined not to make it the personal debt of the Party, whose original debt it was not[m].

If a Person who is master of both funds charges a personal debt on the real Estate, his Heir shall not have it exonerated by the personal Estate[n].

Where a Purchaser of an Equity of Redemption dies, the personal Estate will not be applied for the benefit of the Heir, it not being the Ancestor's Debt[o].

[m] Wood v. Huntingford, 3 Ves. 131. and see Billinghurst against Walker, 2 Bro. C. C. 608.

[n] Hamilton against Worley, 4 Bro. C. C. 199.

[o] Pockley v. Pockley, 1 Vern. 36. Tweddell v. Tweddell, 2 Bro. C. C. 107. 154.

If an Equity of Redemption is lost by lapse of time, the Mortgagee is considered as possessed of the *Land*, and it passes as such.

Before the Statute of 3 & 4 Wm. & M. c. 14. the Heir was not bound by Lands descending to him, where sold or aliened before Action brought; and if an obligor devised his Land, the Devisee so selling was not liable to the obligee[a]: that statute, therefore, was passed to remedy the defect in the statute (13 Eliz. cap. 5.) of fraudulent Conveyances, and to extend it to fraudulent Devises[b], and render the Heir liable for the value of assets aliened[c]. Since this Statute, therefore, a Reversion in Fee, coming into the Possession of a Son, as Heir to his Father, who died indebted by specialty, is assets for the payment of such debts, though it be devised by the Son[d].

So, if there be a Son and Daughter by one Venter, and a Son by the second Venter, and the Father dies indebted, and the Son by the first Venter enters and is seized, and dies, the Daughter is entitled by way of *possessio fratris*, and is liable to her Father's debts[e].

By the express words of the statute (3 & 4 *W.* & *M. c.* 14.) where there is any devise or appointment by Will, of Lands, for payment of debts or Children's Portions, according to an Agree-

[a] Fremoult v. Dedire, 1 P. Wms. 431.

[b] Kinaston v. Clark, 2 Atk. 204.

[c] See Coleman and Winch, 1 P. Wms. 277.

[d] Kinaston v. Clarke, 2 Atk. 204.

[e] Ib. 205.

ment before Marriage, other than the Heir at Law, such Will shall be of force. And though the Statute prevents a devise for *payment of Legacies*, so as to disappoint Creditors by specialty, it does not prevent a devise for payment of debts generally; though the effect of such a devise, is, to let in Creditors by simple contract, to the prejudice of Creditors by specialty[p]; who, in such cases, having no specific lien on the Land[q], must come in with the other Creditors *pro rata*[r], for there is no relief but in a Court of Equity, as they could have no action against the Heir, or against the Heir and Devisee jointly[s].

A devise for payment of debts takes the case entirely out of the Statute[t], and it stands, as it would have done, before the Statute was made; and the Creditor can claim only under the Will. If, therefore, an Estate be devised to Trustees, in Trust, *out of the yearly Profits*, to pay debts, &c. the Creditors cannot obtain a decree for a *Sale of the Estate*[u], though had there been no devise for payment of debts, the specialty Creditor would (under the Statute) have had a right to have his debt raised by sale; but though a bequest by Will or a charge[v], in Law or Equity for payment

[p] See Freemoult v. Dedire, 1 P. Wms. 430. 3 Atk. 630. Kidney v. Coussmaker, 12 Ves. 154.

[q] Deacon v. Smith, 3 Atk. 326.

[r] Hearnes v. Bance, 3 Atk. 630.

[s] 2 Ves. 590. and see How and Chapman, 4 Ves. 550.

[t] 3 Wm. and Mary, c. 14.

[u] Lingard against Darby, 1 Bro. C. C. 312.

[v] Hargrave v. Tindal, 1 Bro. C. C. 135. Batson v. Lingreen, 2 Bro. C. C. 94. Bailey v. Elkins, 7 Ves. 222,3.

of Creditors, is not fraudulent within the Statute of Fraudulent Devises[w]; yet if a devise for the payment of debts be in a manner *which will not answer the purpose*, such Devise does not take the case out of the Statute[x].

Where a Will creates a charge upon the realty for the payment of debts, it relates to the time of the death of the Testator, and all debts he contracts during his whole Life will be a charge[y].

And if a person owing simple contract debts, barred by the Statute of Limitations, devises his Lands in Trust to pay his debts; the debt is, it seems, according to several decisions, revived[z]; but the reason of this is not easily seen, and there is a recent decision to the contrary[a]. Directing an Estate to be sold, does not imply that it must be sold at all events, if the debts can be satisfied without[b].

And if Land is devised to Trustees and their Heirs to sell, and out of the Money arising by the Sale to pay Legacies, and among the rest, a Legacy to the Heir at Law; yet the Land will not be turned into personal Estate, nor more directed to be sold than what is necessary for the

[w] Bayley v. Elkins, 7 Ves. 323. Hughes against Doulben, 2 Bro. C. C. 614. Lingard v. Earl of Derby, 1 Bro. C. C. 311.

[x] Hughes against Dolben, 2 Bro. C. C. 624. but see Willes's Reports, p. 524.

[y] Brudenel v. Boughton, 2 Atk. 273. Bridgman v. Dore, 3 Atk. 201.

[z] Gofton v. Mill, 2 Vern. 141. Pre. Ch. 9. Gilb. Lex Præt. MS. Blakeway v. Strafford, 2 P. Wms. 373. S. C. Select Cas. 57. Jones v. Earl of Strafford, 3 P. Wms. 84.

[a] Executors of Fergus v. Gore, 1 Sch. and Lefr. 109. and see note [b].

[b] Elliot v. Merryman, 2 Atk. 42.

payment of the Legacies, and the Heir has the Surplus [c]; nor is there any case in which it has been held that the Surplus, after the particular purpose is answered, forms part of the personal Estate, so as to pass by a residuary bequest [d].

Cases on Wills are very numerous, upon the question, whether the terms used, amount to a charge of the debts upon the real Estate. The Court is always anxious on these occasions to make a man do that which is morally just [e], and hinder him from sinning in his grave; and in one case the Court has even said, that if the Testator talks about debts in the beginning of his Will, the real Estate must be charged [f]; and a Will has been construed, for the benefit of Creditors to charge real Estate, (though not expressly mentioned) by implication on general words, but that implication may be afterwards destroyed [g].

If, therefore, a Testator says, "my debts and legacies being first deducted, I devise all my Estate real and personal to I. S." this amounts to a devise to sell for payment of debts [h].

If the Will directs merely that "all his debts and funeral Expences might be paid and satisfied by his Executors," and the real Estate is *specifically devised*, these words will not charge the real Estate [i].

[c] Randall v. Bookey, 2 Vern. 425.

[d] Manghan v. Masson, 1 Ves. and Bea. 416.

[e] 3 Ves. 551. 5 Ves. 361. and 2 Ves. 312.

[f] Williams v. Chitty, 3 Ves. 552.

[g] Thomas v. Britwell, 2 Ves. 313.

[h] Newman v. Johnson, 1 Vern. 45.

[i] Powell v. Robins, 7 Ves. 209. Brydges v. Landen, cited 3 Ves. 550. Keeling v. Brown, 5 Ves 359. and see a case of this nature Davis and Gardiner, 2 P. Wms. 187.

So, where a Testator directed his Trustees to possess themselves *of his Estate and Substance*, and to pay Debts, this was held to be a charge of the debts upon the real Estate [k].

And it seems, that wherever a Testator says, "he wills, that his debts shall be paid," that will ride over every disposition, either as against his Heir at Law, or Devisee [l].

By a devise, therefore, "after payment of his debts," the debts are charged [m]; and if there be a charge of all the Testator's Estates for payment of debts, and a particular Estate is devised to A. the Devisee takes, subject to the debts [n].

A general charge upon Land for payment of debts, where the Testator has Freehold and Copyhold, renders the Copyhold liable, as well as the Freehold [o].

If there be a general charge of Lands by Will, for the payment of debts, and a devise afterwards of a particular Estate for that purpose, it will not restrain the general charge, unless there be express negative words [p].

If there be a devise of Lands to Executors till debts paid, remainder to Testator's Son in Tail, and the Son dies before the debts are paid, the Estate of the Executors is only a chattel Interest,

[k] Foster v. Cooke, 6 Ves. 347.

[l] Shalcross v. Finden, 3 Ves. 739.

[m] Ib. 738.

[n] Clarke v. Sewell, 3 Atk. 100.

[o] Coombes against Gibson, 1 Bro. C. C. 273. Kentish against Kentish, 3 Bro. C. C. 257.

[p] Ellison v. Airey, 2 Ves. 568. Lord Warrington v. Booth; 1 Bro. P. C. 455.

and will not hinder the Son's Wife of dower ; but the Dower will not commence in possession, nor damages be recoverable for detaining it, but from the time of the debts being paid [b].

Where sums are by Will directed to be raised, by the *Rents and Profits* of an Estate, within a *particular time*, within which, the Estate would not answer the charge, the Court has directed a *Sale:* afterwards, the Court proceeded still farther, and directed a Sale on the words *Rents and Profits* alone [c], though this is seldom agreeable to the Testator's intention ; on the ground, that *Rents and Profits*, in a Will, mean the Land itself [d]. If, however, a Trust be created for payment of debts, by perception of *Rents and Profits*, *or* by *Mortgaging*, the Land cannot be sold for that purpose, as it might have been, if only the words *Rents and Profits* had been used [e]; and so where there was a power of making Leases in order to raise Money for payment of the debts, it was held there could not be a Sale, because such a power would be frivolous, if a Sale was intended [f]. In cases of this kind, a private Act of Parliament is sometimes resorted to [g].

[b] Hitchens v. Hitchens, 2 Vern. 404.

[c] Berry v. Askham, 2 Vern. 26. and see 1 C. C. 176.

[d] Baines v. Dixon, 1 Ves. 41; and see Green v. Belcher, 1 Atk. 506.

[e] Vid. Ridout v. Earl of Plymouth, 2 Atk. 104. Lingard v. Earl of Derby, 1 Bro. C. C. 311.

[f] Ivy v. Gilbert, 2 P. Wms. 13. Baines and Dixon, 1 Ves. 42.

[g] See the recommendation in Ridout v. Plymouth, 2 Atk. 105.

Where Lands are devised to Trustees to raise Money for several purposes, and they raise the Money out of the Profits, the Land is thereby discharged, and the Persons interested must resort to the Trustees [h].

If a Real Estate be once charged by a Will duly executed, with the payment of all Debts [i], Legacies [k], and Annuities, and not merely particular Legacies [l], as "Legacies above mentioned [m]," or "hereby given [n]," the Testator may afterwards give either Legacies or Annuities, (Annuities are held to be Legacies [o], unless the Testator himself distinguishes them [p]) by an *unattested* codicil. The rule is so settled in many cases [q], and is too well established to be disturbed; though it has been doubted whether it is perfectly consistent with the Statute of Frauds; for, in effect, the Testator disposes of his Land by an unattested codicil, when he is at liberty to burthen it with Legacies so given; and it is observable that, all these have been cases, not of a primary charge, but auxiliarly, and in aid of the personal Estate,

[h] Prec. Ch. 144.

[i] See Cox v. Bassett, 3 Ves. 163.

[k] Brudenel v. Boughton, 2 Atk. 274. Buckeridge v. Ingram, 2 Ves. Jun. 665.

[l] See 2 Ves. Jun. 665.

[m] Masters v. Masters, 1 P. Wms. 423.

[n] Bonner v. Bonner, 13 Ves. 379.

[o] See Duke of Bolton v. Williams, mentioned in Habergham v. Vincent, 2 Ves. Jun. 231. Sibley v. Perry, 7 Ves. 534.

[p] As in Nannock v. Horton, 7 Ves. 391.

[q] Hyde v. Hyde, Eq. Ca. Abr. 409. Lord Inchiquin and O'Brien, Ambl. 33. Masters and Masters, 1 P. Wms. 423. Jackson and Jackson, in n. 3 to 1 P. Wms. 423. Hannis v. Packer, Ambl. 556. Brudenell v. Boughton, 2 Atk. 268. Ha-

which is the primary fund[q]. But Legacies out of a Real Estate given by an unattested paper cannot stand, unless that paper is clearly referred to by a Will duly executed, so as to be incorporated with it[r]; and if a Testator by his Will does not say that all annuities and all Legacies he shall hereafter give shall be charges, but only, that, if at some future period he shall think proper to declare Legacies and Annuities to be charges upon the Real Estate, then the Trustees shall pay them out of the Real Estate, this the Law will not allow: it will not allow a Person by Will duly executed, to reserve a power to charge by a Will not duly executed[s].

If a Testator says he charges all the Legacies given by his Will upon his Real Estate, and gives £20 to *A.*, he may by an unattested codicil give that Legacy of £20 to *B.* A Person in such case cannot create new Legacies; but he may modify or alter any before given: he cannot give fresh Legacies upon Land, unless future Legacies are charged; but he may substitute one for another[t].

In several cases, it was holden that, upon a

bergham v. Vincent, 1 Ves. Jun. 411. Leacroft against Maynard, 3 Bro. C. C. 233. S. C. 1 Ves. Jun. 279. Reay v. Hopper, decided by Lord Kenyon, and mentioned in Haberghain v. Vincent, 2 Ves. Jun. 231. Cox v. Bassett, 3 Ves. 163,4. Attorney Gen. and Ward, 3 Ves. 327. Rose v. Cunynghame, 12 Ves. 37. etc. Bonner v. Bonner, 13 Ves. 382.

[q] Habergham v. Vincent, 4 Bro. C. C. 389. Hooper and Goodwin, 18 Ves. 167.

[r] Smart v. Prujean, 6 Ves. 560.

[s] Vid. Rose v. Cunynghame, 12 Ves. 29; and see Habergham v. Vincent, 2 Ves. Jun. 230. and 4 Bro. C. C. 370,1.

[t] Attorney Gen. v. Ward, 3 Ves. 331.

devise for payment of debts, simple contract Creditors were entitled to interest [u]; but *Lord Hardwicke* decided to the contrary [v], and such is now the established Rule of the Court [w].

Creditors are paid Interest according to the nature of their debts.

Simple contract creditors have no Interest allowed them, and this, though a Trust out of Real Estate, be created for the payment of debts and Legacies [y], and even of the Interest of debts [z], in aid of the personal Estate.

If an Account be *stated* by the Parties, it carries Interest from the time of stating [b]; but the balance of a mutual account does not carry Interest [c]: and if an account is decreed, it carries no Interest until the Master's Report is confirmed [d].

A Debt consisting of Principal and Interest computed on a Master's Report, afterwards confirmed, has the effect of a Judgment at Law.

Debts carrying Interest in their own nature, have Interest calculated upon them in the Master's office; but Debts not carrying Interest have not; and when subsequent Interest is calculated,

[u] 1 P. Wms. 229, 334. and 2 P. Wms. 25.

[v] 2 Atk. 109. 2 Ves. 364, 587.

[w] Chapman v. Ansell, MS.

[y] Barwell v. Parker, 2 Ves. 364. Lloyd v. Williams, 2 Atk. 108.

[z] Tait v. Lord Northwick, 4 Ves. 816.

[b] 2 Ves. 365.

[c] Borret v. Goodere, 1 Dick. 428.

[d] Vid. 2 Eq. Abr. p. 8, in marg. Earl of Bath v. Earl of Bradford, 2 Ves. 588. overruling Maxwell v. Wettenhal, 2 P. Wms. 26.

it is only upon the Debts upon which Interest had been calculated before the Report, and no Interest is given upon the Debts, which upon the Report do not carry Interest [e]. This has the appearance of hardship, but the policy of the doctrine seems to be, to prevent those, who ought to be most active in prosecuting a decree, from becoming negligent, in expectation of Interest [f].

Interest is not given from the confirmation of the Report upon demands liquidated by it, but not bearing Interest in their nature, as *Legacies* and arrears of *Annuities* [g]; but on *further directions*, it seems, the Court sometimes gives Interest on demands not carrying Interest in their nature: as where Interest was not given by the decree, because the circumstances which made it proper, could not appear till the Report [h], or where there has been gross and wilful misconduct subsequent to a decree or order for payment, by delay in the execution of it [i]; but the single circumstance that the demand is liquidated by the Report, or any delay that might have been prevented by the diligence of the Party claiming

[e] Creuze against Lowth, 4 Bro. C. C. 318. overruling a contrary doctrine determined in same case, 4 Bro. C. C. 157. S. C. better reported 2 Ves. Jun. 157. and see 1 Bro. C. C. 43.

[f] See what is said in Anderson v. Dwyer, 1 Sch. and Lefr. 301.

[g] Creuze v. Hunter, 2 Ves. Jun. 157. Sed Vid. as to annuities, the Drapers Company v. Davis, 2 Atk. 211; and Ferrers v. Ferrers, For. p. 2.

[h] See Margerum and Sandiford, mentioned 2 Ves. Jun. 162.

[i] See Bickham v. Cross, 2 Ves. 471; and see Sammes v. Rickman, 2 Ves. Jun. 36; and see Tew v. Lord Winterton, 1 Ves. Jun. 452.

Interest, or which is the necessary consequence of the nature of the Jurisdiction, is not considered as a sufficient ground to charge the other Party with Interest [k].

As *simple Contract* debts do not carry Interest, so neither do arrears of a Jointure, nor the arrears of an annuity or *Rent-charge* [l], unless where the sum is certain and fixed; and there is either a clause of re-entry, or some penalty upon the Grantor [m], and Creditors will not, by such allowance, lose their debts [n].

But though Interest is not, in general, given upon the arrears of a Jointure [o], it has been given to a *Jointress*, where there has been a long and obstinate delay of payment, and frequent demands of the Money [p].

Bail in Error, who had been obliged to pay a Bond on which an Action was brought against the deceased, and costs, are not to be considered as specialty Creditors, but only as simple contract Creditors [q].

The Master in computing Interest on a Bond, is not to go beyond the penalty [r], *except under*

[k] See Mr. Vesey's note to Creuze and Hunter, 2 Ves. Jun. 169.

[l] Vid. cases cited in Creuze and Lowth, 4 Bro. C. C. 318; and see Countess of Ferrers v. Earl Ferrers, For. 3. and Anderson v. Dwyer, 1 Sch. and Lefr. 301.

[m] For. 3.

[n] Morris v. Dillingham, 2 Ves. 170.

[o] Anon. 662.

[p] Stapleton v. Conway, 1 Ves. 428.

[q] Goodman v. Purcell, 2 Anst. 548.

[r] Tew v. Earl of Winterton, 3 Bro. 489. and S. C. 1 Ves. Jun. 451. Knight and Maclein, 3 Bro. 496. Mackworth v. Thomas, 5 Ves. 331. Clarke v. Lord Abingdon, 17 Ves. 106.

special circumstances [s]; and so, where there is a Bond *and Judgment* assigned, Interest is calculated to the date of the Report, but not so as to exceed the penalty [t]. Where, however, there was a Bond, and also a Mortgage by way of additional Security, if the Creditor resorts only to the Bond, he will not be allowed Interest, beyond the amount of the penalty of the Bond [u]; but if he claims in respect of his Mortgage, he is entitled to his Debt and whatever Interest may have accrued [v].

Interest is not allowed on the arrears of an annuity secured by Bond, though it was given in bar of Dower [w].

Interest is allowed on a written agreement to pay by instalments [x], and also on all debts that in their nature carry Interest, as notes payable at a *day certain*, or on demand, and demand made [y]; but it is not allowed upon notes payable at a day uncertain, or upon shop debts [z]; but the Court in the administration of assets follows the Law; and if Interest would be given at Law in the shape of damages, the party claiming against the assets in Equity, is allowed the sum which he would have recovered at Law [a].

[s] See Clarke v. Seton, 6 Ves. 411.

[t] Sharpe v. Earl Scarborough, 3 Ves. 557.

[u] Clarke v. Lord Abingdon, 17 Ves. 106.

[v] Ib.

[w] Tew v. Lord Winterton, 1 Ves. 451. S. C. 3 Bro. C. C. 489.

[x] Parker v. Hutchinson, 3 Ves. 133.

[y] Upton v. Lord Ferrers, 5 Ves. 801; and see Lowndes v. Collins, 17 Ves. 27.

[z] Parker v. Hutchinson, 3 Ves. 135.

[a] See Dornford v. Dornford, 12 Ves. 129.

Interest is not allowed on a Judgment, on assets, *quando acciderint* [b].

Where a person, seized of three or four Estates, devises one Estate for the particular purpose of paying his debts, that is applied, and not the other Estates, though they descend; but if after the devise by a Testator, of the whole of his Estate at the time of the devise, subject to a *general charge* (not to a *particular* charge, which would make a difference) for the Payment of debts, and he becomes possessed by devise, or purchase of another Estate, which *descends*, such Estate is applicable to the payment of debts, before the Estate so generally charged with the payment of the debts; for when a general charge is made, applicable to the whole Estate of the Testator at the time, no intention appears that the Estate is so charged with a view to exonerate future property; but where a Testator charges part of his Estate, leaving other part to descend, his inclination, to burthen a part, in exoneration of the rest, is manifest [a].

Where Lands devised are ordered to be sold for the payment of Debts, and the Devisee is an *Infant*, the Estate cannot be sold, until he comes of age. In the mean time, all the Court does, is to declare, that the simple contract Creditors are entitled to stand in the place of the specialty Creditors, with liberty to apply when the Infant

[b] Deschamps v. Vanneck, 2 Ves. 716.

[a] Davis v. Toppe, 1 Bro. C. C. 528.

comes of age to have the Estate sold to pay their debts[b].

It was formerly held that where Trustees in a devise for the payment of debts, were also made *Executors*, the Assets were *legal*. It was so considered at Law[c], and the Decisions in Equity followed the Law[d]; except where the Devise of the Lands was to the Executor, *and his heirs, in trust to sell*, &c. in which case, the Court decided, the Lands would be *equitable Assets;* because, as the Lands must go in a course of descent, he must take as Trustee, and not as Executor[e]. But Lord *Camden*, in a Case, in which all the doctrine was sifted, after quoting the case of *Lewin* v. *Oakley*[f], observed, "And now, I think the old Rule is overthrown, and that wherever the Land itself is devised to the same persons who are Executors, the Assets will be equitable. And I hold the case to be the same whenever the Land is devised to them, or *to them and their Heirs*, for in both cases they are equitable Trustees[g]. The descent is broke, and the specialty Creditors have lost their Fund.

[b] Powel v. Robins, 7 Ves. 211. and see Charles v. Andrews, 2 Mod. 151, 3. Cooke v. Parsons, 2 Vern. 429.

[c] Edwards and Graves, Hob. 265. Alexander v. Lady Gresham, 1 Lev. 224. Dethick v. Carravan, 1 Lev. 224. 1 Roll. Abr. 920. G. 6. Boswell v. Coxant, Hard. 405.

[d] Graves and Powel, 2 Vern. 248. Anon. 2 Vern. 405. see Clutterbuck v. Smith, Prec. Ch. 127. Blatch v. Wilder, 1 Atk. 410.

[e] Anonymous, 2 Vern. 133.

[f] 2 Atkyns, 50.

[g] See to same effect, Buckley v. Williams, 1 Dick. 387.

And I can hardly now suggest a case where the Assets would be *legal*, but where the Executor has a naked power to sell *quâ* Executor[h]."

Some Judges appear to have been of opinion, that if the Testator devises his Lands to his Heir at Law, for the payment of debts, and it is the same Estate he would have taken by descent, he takes the Land by descent, and it will not be *equitable* Assets[i]; but it has been decided, that a mere charge, that does not break the descent, makes equitable Assets[k]. And where an Estate charged with the payment of debts, is devised to a *Stranger*, the Estate is *equitable Assets*[l].

If a *cestui que Trust* of a real Estate makes a Mortgage upon it in Fee, and devises the Equity of Redemption to his Son, and his Heirs, subject to the payment of debts, and dies indebted by Bond and simple Contract: this being a Mortgage of the whole Inheritance, and nothing remaining in the Mortgagor, the bond Creditor has no preference, but must be paid *pari passu* with the other Creditors[m].

Where there is a general power given or reserved to a Person, for such uses, intents, and purposes, as he shall appoint by Will, or otherwise, this makes it his absolute Estate, and gives him such a dominion over it, as will subject it to his

[h] Silk v. Prime, mentioned in note to Newton and Bennet, 1 Bro. C. C. 138. and see Prowse v. Abingdon, 1 Atk. 484.

[i] Plunket v. Pierson, 2 Atk. 90. and Degg v. Degg, 2 P. Wms. in note 2.

[k] See Bayley v. Elkins, 7 Ves. 319. Shiphard v. Lutwidge, 8 Ves. 26. Hargrave v. Tindall, 1 Bro. C. C. Batson v. Lindegreen, 2 Bro. 94.

[l] Plunket v. Penson, 2 Atk. 293.

[m] Plunket v. Penson, 2 Atk. 290.

debts [m]: so if a Man has a power to dispose, by appointment of a Reversion in Fee, and makes no disposition of it, yet it shall be Assets to satisfy specialty Creditors [n].

A *Power* to charge an Estate with a Sum of Money, unless executed, is not Assets for the payment of debts [o]; for though Equity will aid a *defective* execution of a Power, yet the *want of execution*, generally speaking, is, as observed elsewhere [p], never supplied.

It has before been observed [q], that if there be an *attempt* to execute a power in favor of Creditors, but the execution is defective, the defect may be supplied [r]; and if a power be formally executed, but in favour of a *Volunteer*, the Court will take the subject from that person, and give it to the Creditors of him who had the power [s].

Put although Creditors in these cases prevail over Volunteers, yet if a person taking under a voluntary appointment, sells to another for a valuable consideration, such Purchaser will be preferred to the Creditors [t].

If the Vendor of an Estate reserves the purchase Money, payable as he shall appoint by an

[m] See Thompson v. Towne, 2 Vern. 319. S. C. Pre. Ch. 52. Lassels v. Cornwallis, 2 Vern. 465. Bullock v. Fladgate, 1 Ves. and Bea. 478. Barnton v. Ward, 2 Atk. 172. Troughton v. Troughton, 3 Atk. 656. S. C. 1 Ves. 86.

[n] Ib.

[o] Lord Cornwallis's Case, 2 Freem. 279. sed vid. Bullock v. Flugate, 1 Ves. and Bea. 478.

[p] Ante, p. 45.

[q] Ante, p. 46.

[r] Tollet v. Tollet, 2 P. Wms. 489.

[s] Lord Cornwallis's case, 2 Freem. 279. George v. Millbank, 9 Ves. 190; and see what is said in Holmes and Coghill, 7 Ves. 499. and see also Hinton v. Toye, 1 Atk. 465. and Bainton v. Ward, 2 Atk. 172. Pack v. Bathurst, 3 Atk. 269.

[t] George v. Milbanke, 9 Ves. 190.

Instrument, executed in a particular manner, and afterwards exercises his power, the Money will, as between his Creditors and Appointees, be Assets [u].

Where Lands are devised generally for the payment of Debts, the Vendee of the Estate need not see to the application of the Purchase Money, but the Trustee only; but if it be for the payment of any particular debts, or for the payment of debts in a Schedule annexed, there the Vendee is obliged to see to the application of it [v]; and that although the Estate be sold under a decree [w], or in pursuance of an Act of Parliament [x].

If a devise be of Lands for the payment of Legacies, the Vendee must see to the discharge of the Legacies [y]; but if the devise of the Lands be for the payment of Debts generally, and of Legacies, the Purchaser is not bound to see the Debts or Legacies paid: if he were liable, in such case, to see the Legacies paid, that would make it necessary for him to see if the Debts were paid, as they must first be discharged [z].

According to several cases an *Equity of Redemption* of *freehold* [a], or *leasehold* [b], Estates, is an

[u] Sugd. Vend. and Purch. 144. Thomson v. Towne, 2 Vern. 319, 416.

[v] Lex Prætoria MS. Tompkins v. Tompkins, Gilb. Eq. Rep. 90. Williamson v. Clerk, 3 Bro. C. C. 96. Hardwicke v. Mynd, 1 Anstr. 109.

[w] Lloyd v. Baldwin, 1 Ves. 173.

[x] Cotterell v. Hampson, 2 Vern. 413.

[y] Lex Prætoria, MS.

[z] See Sugd. Vend. and Purch. 413. who cites Jebb v. Abbott, and Benyon and Collins, Butl. n. (I.) to Co. Litt. 290[b]. S. 12; and Rogers v. Skillicorne, Ambl. 188.

[a] Solley v. Gower, 2 Vern. 61. Ryall v. Ryall, 1 Atk. 60. Plunket v. Penson, 2 Atk. 294. see Plucknet v. Kirk, 1 Vern. 411. where point left undetermined.

[b] Hartwell against Chitters, Ambl. 308. Scott v. Scholey, 8 East. 465. Sir Charles Cox's case, P. Wms. 341. overruling

equitable Interest, and is *equitable Assets;* but other Cases have determined that *Chattels* whether real or personal, mortgaged or pledged by the Testator, and redeemed by the Executor, shall be Assets at *law*, in the hands of the Executor, for so much as they are worth beyond the sum paid for their Redemption, though recoverable only in Equity [z].

Where a Man takes an Assignment of a Term in a Trustee's name, and the Inheritance in his own name, so that by construction in Equity, the Term is attendant upon the Inheritance, such term in Equity is Assets for the payment of debts, as well as a Term taken in his own name, is Assets at Law; but with this difference, that the Heir has the benefit of the Surplus of the Trust of a Term, and not the Executor, after debts paid; but if a term be expressly declared by Deed, to be attendant on the Inheritance, there such a Term will not be considered as Assets in Equity [a].

It is a rule, (and as we have seen [b], not confined to cases merely of Assets,) that if a Party has two funds liable to his claim, a person having an Interest in one only, has a right in Equity, to compel the former to resort to the other, if that is necessary for the satisfaction of both [c].

This Rule has given rise to what in the admi-

overruling doubts in Cole v. Warden, 1 Vern. 410. and in Lyster v. Bolland, 3 Bro. 481. S. C. 1 Ves. Jun. 431.

[z] See 3 P. Wms. 344. n. 2. and the cases there cited.

[a] Chapman v. Bond, 1 Vern. 188. S. P. 2 Ch. Cas. 152.

[b] Ante, p. 202. etc.

[c] Attorney General v. Tyndall, Ambl. 391. Aldrich v. Cooper, 8 Ves. 389. Trimmer v. Bayne, 9 Ves. 209.

nistration of Assets, is termed, *Marshalling of Assets.*

Marshalling of Assets takes place in favor of simple contract Creditors and of Legatees, Devisees[c], and Heirs; and in a few other cases, but not in favour of next of kin[d]; and the Rules of the Court, in this respect, have been considered to be of great consequence to the Practice of the Court[e], and as useful a power as any the Court possesses; for where there are Creditors, and Legacies to Children, for their Portions, if the Law was to have its full force, (though the reason of it was good, when it was originally framed) and the Creditors were to exhaust the personal Estate, it would be the ruin of Families[f]. The Court, therefore, leans and endeavours to bring Creditors within the Rule, as to the Marshalling of Assets[g].

If a Bill is filed for the Administration of Assets, and the Court sees at any Period of the Suit, that Creditors by simple Contract, will be deprived of their debts, by specialty Creditors going against their Fund, the Court will of itself, though the Bill is not framed with that view, direct the Assets to be marshalled. If, for instance, it appear for the first time by the Master's *Report*, that a specialty Creditor was paid out of the Per-

[c] Chitty against Parker and others, 4 Bro. C. C. 411.
[d] 1 P. Wms. 680.
[e] Galton v. Hancock, 2 Atk. 438.
[f] See Hanby against Roberts, Ambl. 128.
[g] Lacon v. Mertins, 1 Ves. 312.

sonal Estate, it is not necessary to file another Bill, for the purpose of marshalling the Assets[h].

And first, with respect to *simple contract Creditors.*

Where Debts by *Specialty*, which are a lien at Law on the Real Estate, are discharged out of the personal Assets by Executors, in case of the Lands, the Creditors by simple Contract, are entitled to stand *pro tanto*, in the place of the Creditors by Specialty[i]; and to have their debts satisfied out of the Lands, and the Court will decree them to be sold for that purpose[k].

If a Mortgagee of Freehold and Copyhold Estates, who is also a Specialty Creditor, exhausts the Personal Assets, the simple contract Creditors are entitled to stand in his place *pro tanto*, against both the Freehold and Copyhold Estates[l]. Upon the same Principle, the benefit of the *Vendor's Lien* on the Estate, for the purchase Money, has been marshalled[m].

[h] Gibbs v. Ougier, 12 Ves. 416.

[i] Fenhoulet v. Passavant, 1 Dick. 253. Exparte Hodgson, 2 Dick. 737.

[k] See Charles v. Andrews, 2 Mod. 151, 3.

[l] Aldrich v. Cooper, 8 Ves. 382. The case of Robinson v. Tonge, respecting Copyholds mentioned, 1 P. Wms. 680. in note, was in this case overruled. Robinson v. Gee, 1 Ves. 252. and see Waring and Ward, 7 Ves. 836. Bell v. Phyne, 7 Ves. 460.

[m] Trimmer v. Bayne, 9 Ves. 209; and see Austin v. Hatsey, 6 Ves. 475. Macreth v. Symonds, 15 Ves. 338. S. C. MS. where Lord Eldon inclines to the same reasonable doctrine. Polexfen and Moore, 3 Atk. 277. a seeming Authority in favor of Marshalling, appears not to be so when corrected by the Register's Book, see Sugd. Vendor and Purch. 445, 6. see also Blackburn and Gregdon, 1 Bro. 424. Certainly, Charles and Andrews, 2 Mod. 151, 3. and Coppin v. Coppin, 2 P. Wms. 291. S. C. Select Cas. in Ch. 28. are authorities against the Marshalling.

If there be a Debt owing to the King, the Court will direct the King's debt to be satisfied out of the Real Estate, that the other Creditors may be let in to have a satisfaction of their debts out of the Personal Assets [n].

With respect to *Legatees*, it is, with some exceptions, a Rule, that they have a right to marshal as against *Estates descended*; but not as against *Estates devised*, unless the Lands devised be expressly subjected to Debts [o], or are liable to a *Mortgage* [p].

If one, seized in fee, owes debts by Bond, and devises his Land to his Heir in Tail, and gives several Legacies, and afterwards dies leaving the Heir his Executor, and the Heir with the personal Estate pays off the Bond debts, by which means there are not Assets to pay the Legacies, the Legatees are without remedy, the Land being devised in Tail to the Heir. It had been otherwise if such Land descended to such Heir in Fee [q].

It was held, in one case, that the Assets could not be marshalled for the payment of Legacies [r]; but this doctrine has been disapproved [s]. Though Assets, it seems, will not be marshalled in favor of

[n] Sagittary v. Hyde, 1 Vern. 455.

[o] Herne v. Meyrick, 1 P. Wms. 201.

[q] See Lloyd v. Williams, 2 Atk. 110. Clifton v. Burt, 1 P. Wms. 679. Hanby against Roberts, Ambl. 129. Haslewood and Pope, 3 P. Wms. 324.

[p] Lutkins v. Leigh, For. 54. S. C. MS.

[r] Keeling v. Browne, 5 Ves. 362; and see the reasoning in Kightly v. Kightly, 2 Ves. jun. 328.

[s] See Williams v. Chitty, 3 Ves. 551.

an Executor or a Residuary Legatee [t], it is a Rule, that if the Testator give by his Will, a Lease or a Horse, or any specific Legacy, and leaves a debt by Mortgage or Bond in which the Heir is bound, the Heir cannot compel the specific Legatee to part with his Legacy in case of the Real Estate; and though the Creditor may subject this specific Legacy to his debt, yet the specific Legatee will in Equity stand in his place [v], and the same Rule applies to *pecuniary* Legatees [w].

If, for instance, a Testator owes a debt for which his real and leasehold Estates are Mortgaged, Equity will charge the debt on the real Estate in order to enlarge the Fund for the payment of the Legacies as well as debts [x].

Where one by Will gave several Legacies, some charged on the real Estate, and others not, it was held, that if the personal Estate proved insufficient to pay all the Legacies, the Legacies charged on the real Estate should be paid out of the same; or if they had been paid out of the personal Estate, the other Legatees, as to so much, should stand in their place upon the Land [y].

And where a Testator gave some Legacies by *Will*, and others by a *Codicil*, and the Lands were charged with the Legacies in the Will, but not with the Legacies in the Codicil, and the Personal Estate was not sufficient to pay all the Legacies,

[t] See 1 Ves. 252.

[v] Tipping v. Tipping, 1 P. Wms. 729; and see Burton v. Pierpont, 2 P. Wms. 81.

[w] See ib. and see Davis v. Gardiner, 2 P. Wms. 190.

[x] Davis v. Gardiner, 2 P. Wms. 190.

[y] Bligh v. Earl Darnley, 2 P. Wms. 619.

the Assets were marshalled, and the Legatees in the Will were ordered to be paid out of the *real Estate*, and if that was deficient, they were, as to the surplus, to come in average with the Legatees in the Codicil, to be paid out of the Personal Estate [z].

The Court will not marshal Assets to pay charity Legacies [a], for by that means the Statute of Mortmain [b] would be eluded [c]; but where there was a bequest of the remainder of the Testator's effects, Annuities, Mortgages, &c. to a charity, it was held, the Devise of the Mortgages was void, but being part of the enumerated residue, the Court ordered them to be applied first in payment of debts, before any other part of the personal Estate, to have a larger fund for the Charity [d]. This being said to be, not marshalling Assets, but *arranging* the different species of personal Estate [e]!

If a Legacy be charged on the real and personal Estate of the Testator, the personal Estate must be first applied; but if the Legacy be expressly given out of the real Estate, such Estate must

[z] Bonner v. Bonner, 13 Ves. 385; and see Masters v. Masters, 1 P. Wms. 422. see a case of this kind, Hanby and Roberts, Ambl. 127.

[a] Foster against Blagden, Ambl. 704. Hillyard v. Taylor, Ambl. 714. Mogg v. Hodges, 2 Ves. 52. Makeham v. Hooper, 4 Bro. C. C. 153. Waller against Childs, Ambl. 524; and see Attorney General v. Tyndal, cited Ib. p. 526. and reported Ib. p. 615. Sed vid. Arnold v. Chapman, 1 Ves. 110. Attorney General v. Greaves, Ambl. 158. and Attorney General and Tomkyns, Ambl. 217. Attorney General v. Lord Mountnorris, 1 Dick. 379.

[b] 9 Geo. 2. c. 36.

[c] Attorney General against Tyndall, Ambl. 615.

[d] Attorney General against Caldwell, Ambl. 636.

[e] Ib. Reporter's note, p. 636. but see contra 3 Bro. C. C. 373. 4 Bro. C. C. 156.

bear the burthen of it, and the personal is not applicable in aid [f].

If one devises his Real Estate, and gives pecuniary or specific Legacies not charged on that real Estate, and dies, leaving specialty debts, and the specialty Creditors exhaust the Personal Estate, the Legatees are not allowed to stand in their place and come upon the Realty; because it is supposed as much to be the intention of the Testator that the Devisee should have the Real Estate, as that the Legatees should be paid [g]. But Legatees are entitled to stand in the place of Mortgagees [h]. By the same Rule, if one has only personal Estate, and gives specific as well as general Legacies, if the Creditors exhaust the general Assets, yet the general Legatees shall not stand in their place and come upon the specific Legacies [i]. But if one having Land and personal Estate makes his Will, being indebted by specialty, and he gives specific Legacies, and then gives the *rest and residue* of his real and personal Estate; if the Creditors exhaust the Personalty, the Legatees may stand in their place, and come upon the residuary Legatee, because he has only the *rest and residue* [k].

[f] Amesbury v. Brown, 1 Ves. 477.

[g] Haslewood v. Pope, 3 P. Wms. 323. Hanby against Roberts, Ambl. 128. S. C. 1 Dick. 104. under name of Hamley and Fisher, Forester against Lord Leigh, Ambl. 173.

[h] Ambl. 173.

[i] Ambl. 128; and see Forrester v. Leigh, Ambl. 173.

[k] Hanby against Roberts, Ambl. 128, 9. S. C. 1 Dick. 104. under name of Hamley v. Fisher.

Where a Legacy was given to A. charged upon the Real and personal Estate, and other Legacies were given, but not charged upon the real Estate, and *A.* exhausted the personal Estate, the other Legatees were allowed to take satisfaction out of the real Estate devised[l].

The Rule of the Court as to marshalling Assets, applies only as between the real and personal Assets of a person *deceased;* for the Court has no right to marshal the Assets of a person alive, they not being subject to such a Jurisdiction of Equity till his death. Nor can the Court extend this relief to Creditors further than the nature of the Contract will support it; therefore, it must be a specialty Creditor of the person, whose Assets are in question, such as might have a remedy against both the real and personal Estate, or either, of the Debtor deceased: it not being every specialty Creditor, in whose place the simple contract Creditors can come to affect the real Assets, viz. where the specialty Creditor himself cannot affect the Assets, as where the Heirs are not bound [m].

A Recital of a debt in a deed, does not make it a specialty debt [n].

Where the Assets are partly legal, and partly equitable, though Equity cannot take away the legal preference on legal Assets, yet if one Creditor has been partly paid out of such legal Assets, when satisfaction comes to be made out of Equitable Assets, the Court will postpone him,

[l] Ib. 127. etc.
[m] Lacon v. Martin, 1 Ves. 312.
[n] 1 Ves. 313.

till there is an equality in satisfaction to all the other Creditors out of the equitable Assets, proportionable to so much as the legal Creditor has been satisfied out of the legal Assets[n].

A Devisee of a Mortgaged Estate has, on a deficiency of the personal Estate, a right to have the devised Estate, exonerated out of Real Assets, descended on the Heir[o]. Formerly, a *Devisee* could not have aid of the personal Estate; but afterwards[p], it was held, that a particular devisee of such Estate, should have such aid[q].

It seems, that if the Testator devises his Estate to his Heir at Law, though the devise is void, as to the purpose of making the Heir take otherwise than by descent, yet it is held to shew the Testator's Intent that the Heir should have this Land, and therefore the Land must be applied only as other *devised* Land would[r].

If the Heir or Devisee of the Real Estate, (for the Rule applies to an *Hæres factus*, as well as to an *Hæres natus*[s],) is sued by a Bond Creditor, he may stand in the place of that Creditor to be reimbursed out of the Personal[t].

But the Equity to have Real Estate exonerated by Personal, subsists only between the *Heir* or *Devisee* and the Residuary Legatee, and not

[n] Morris v. Bank of England, For. 220.

[o] Galton v. Hancock, 2 Atk. 204, 430.

[p] Cornish v. Mew, Cha. Ca. 271. Pockley v. Pockley, 1 Vern. 36.

[q] Forrester against Lord Leigh, Ambl. 173. Sed Vid. Leigh v. Lutkins, For. 53. S.C. MS.

[r] See note A to Chaplin v. Chaplin, 3 P. Wms. 368.

[s] Pockley v. Pockley, 1 Vern. 37.

[t] Mogg v. Hodges, 2 Ves. 53.

against *specific* or *general Legatees*, much less *Creditors* [v].

If one mortgages his Fee-simple Estate, and devises his Leasehold to *A.* and his Fee-simple to B. and dies leaving no personal Estate, the Devisee must take it *cum onere*, and shall not charge the *Leasehold* Estate specifically devised with the Mortgage [w].

Bona Paraphernalia (unless purchased out of Wife's separate Estate [x],) are liable for debts in favor of Creditors [y]; but not in favor of an Heir. They are preferred to Legatees [z]. A Widow, therefore, in respect of her *Paraphernalia*, has a claim to marshal the Assets as against real Estates *descended* [a], but not against real Assets *devised* [b].

If, for want of Assets, *bona paraphernalia* are applied in payment of the debts of the Husband, and contingent Assets afterwards fall in, they are not applicable to pay the produce of the *bona paraphernalia*, as they would of a *specific legacy* applied in payment of debts [c].

Questions as to what is an *Advancement* frequently arise in the distribution of Assets.

[v] Hamilton v. Worley, 2 Ves. jun. 65. Hawes v. Warner, 2 Vern. 477. S. C. 3 Ch. Rep. 206.

[w] Oneal v. Mead, 1 P. Wms. 693. and see Lutkins v. Leigh, Forrester 53. S. C. MS.

[x] Wilson v. Pack, Prec. Ch. 295.

[y] Ridout v. Earl of Plymouth, 2 Atk. 104. See Lady Tirrell's Case, 2 Eq. Abr. 155. Burton v. Pierpont, 2 P. Wms. 79.

[z] Tipping v. Tipping, 1 Peer Wms. 730. Snelson v. Corbet, 3 Atk. 369.

[a] Probert v. Morgan, 1 Atk. 441. Snelson v. Corbett, 3 Atk. 369. Sed vid. Incledon v. Northcote, 3 Atk. 438.

[b] See Probert v. Clifford, mentioned in note 1 to 2 P. Wms. 544. S. C. Ambl. 6.

[c] Burton v. Pierpoint, 2 P. Wms. 79.

By the Statute (22 and 23 *Car.* 2. c. 10.) it is provided, that no child of the intestate, except his Heir at Law, on whom he settled, in his life time, any Estate in Lands, or pecuniary portion equal to the distributive shares of the other children, shall participate with them of the Surplus; but if the Estate so given him by way of advancement, be not equivalent to their Shares, then that such part of the Surplus, as will make it so, shall be allotted to him.

Questions of *Advancement*, whether they arise on the *Statute of Distribution*, or the custom of London, have been frequently said to receive the same determination[a]; and, certainly, the Statute was in a great degree founded upon the custom[b]. As the custom does not affect a Widow's Estate, or gifts made by her, so neither does the Statute affect her. If the Mother, therefore, being a Widow, advances a child and dies intestate, the child advanced does not bring what he received from the Mother into Hotchpot[c].

The *Statute of Distributions* was made to put an end to the long contest which had been, betwixt the temporal and spiritual Courts[d]; for when the spiritual Court ordered any distribution, or Bond to be given by the administrator for that purpose, the temporal Courts sent a

[a] Elliot v. Collier, 1 Ves. 17.

[b] Edwards v. Freeman, 2 P. W. 449. Holt v. Frederick, 2 P. Wms. 358.

[c] Holt v. Frederick, 2 P. Wms. 356.

[d] See an account of this dispute in Palmer v. Elliot, 3 Mod. 58. Carter v. Crawley, Raym. 496.

Prohibition, being of opinion, that the administrator had a right to all, and that the spiritual Court could not break into that right[e].

The Statute therefore was passed, and in favor of the practice of the spiritual Court, which proceeded to order distribution as often as the Common Law Courts did not prohibit them, and the Act intended to make the Children's provision equal, which was agreeable to the civil Law, where goods moveable and immoveable, (i. e. Lands) are considered as the same, though our Law would never let the Civil Law meddle with Lands[f].

The intention of making the provision of the Children equal, runs throughout the whole Act; first, it gives the two-thirds of the personal Estate (the mother being allowed her third) equally among all the Children. But then the act takes it into consideration, that there may be some of the Children who have received a portion or advancement before, but not so much as to make up their full share; in that case, such child so advanced but in part, is allowed so much more out of the Intestate's personal Estate, as will suffice to make his share equal to that of the other Children. The Statute takes nothing away that has been given to any of the Children, however unequal that may have been. How much soever that may exceed the remainder of the personal

[e] See Hughes and Hughes, Cart. 125. 1 Lev. 233.

[f] Edwards v. Freeman, 2 P. Wms. 441,2. 446. and see Humphrey v. Bullen, 1 Atk. 459.

Estate left by the Intestate at his death, the Child may, if he pleases, keep it all: if he is not contented, but would have more, then he must bring into Hotchpot what he has before received: this manifestly seems to be the intention of the Act, grounded upon the most just rule of Equity, *equality*[g]. The Act does what a good and just Parent ought for all his Children. It has been called, a *Parliamentary Will*[h].

A provision for a Child by *Will*, (for a Case may happen, that as to *part* of the personal Estate, the Testator may die intestate) is not an *Advancement* to be brought into Hotchpot: and by the same Rule, *Land* given by *Will* to a younger Child, is not to be brought into Hotchpot.

Any *Land* provision to the *Heir* at *Law*, of the intestate, however given, is privileged by the Statute of Distribution, and not to be brought into Hotchpot[i].

Any *Land* of *Inheritance* settled by the Freeman upon his Children, or Money given to be laid out in Land[k], is not considered as an advancement either in part, or in the whole, within the *Custom of London*, for the custom affects only the *personal Estate* of the Freeman[l]; but if Lands of

[g] Edwards and Freeman, 2 P. Wms. 443.
[h] Ib. 439, 443.
[i] Edwards and Freeman, 2 P. Wms. 441.
[k] Annand v. Honeywood, 1 Vern. 345.
[l] 2 P. Wms. 274; and see Hume v. Edwards, 3 Atk. 452; and see Cevil v. Rich, 1 Vern. 181. and Stanton v. Platt, 2 Vern. 753.

Inheritance are given to a Child by the Freeman, in bar of the orphanage part, and accepted as such, it will be binding, or at least the Child cannot have both [m].

There are a great variety of Provisions which may be made by Parents for Children; and it could not be expected the Statute of Distribution should enumerate all of them. A *contingent Provision*, where the contingency has happened, is a Provision, and is within the Act; and whereever such Provisions are to take effect in a reasonable time, they are considered within the Act. A child may be provided for by Land, Freehold or Copyhold, or by a charge upon either, or by Money, Goods or Stock in Companies. Some Provisions may be payable to the Child when of age, or upon Marriage; and these contingencies, framed in an infinite variety of ways, as the several circumstances of the parties may require, rendered it impossible for the Act to mention all of them, and therefore it was proper for the Legislature to make use of general Words as they have done [n].

A Provision made for a Child either by voluntary Settlement, or for a good consideration, is an advancement *pro tanto* [o].

A *rent out of Lands* settled upon a younger Child is an advancement, *pro tanto* [p]. So, an *Annuity* given by the Father to commence after

[m] Cox v. Belitha, 2 P. Wms. 274.

[n] Edwards v. Freeman, 2 P. Wms. 440.

[o] Ib. p. 444.

[p] Ib. 440.

his death, is an advancement *pro tanto;* and by the same reason a *reversion* settled on a Child, or a portion, though payable *in futuro* is an *advancement pro tanto,* as it may be valued[q].

Where a Father makes a Provision for a Son on his Marriage, all the limitations in such Settlement, to the Wife and Children of such Son, are to be considered as parts of that advancement; and it is not the Child's Estate for life only, that is to be valued and brought in[r].

If Money be settled payable on a contingency, to take effect within a reasonable time, it is an advancement, *pro tanto,* and it seems that the Court may make a distribution, and order that if the contingency happens, the Money shall be refunded[s].

In these cases of advancement, if the Father dies intestate, the child is entitled to his *testamentary share,* without bringing into Hotchpot the money he has received in advancement[t].

If a Child or Children are *advanced* in the Father's life time, they will be considered as *fully advanced,* unless the *quantum* of the advancement appears in Writing, under the Father's hand[u]. The ground of which is, partly, on the difficulty of taking an account after such a length of time;

[q] Edwards v. Freeman, 2 P. Wms. 442, 444.

[r] Weyland v. Weyland, 2 Atk. 635.

[s] Edwards v. Freeman, 2 P. Wms. 446, 448.

[t] Hearne v. Barber, 3 Atk. 213.

[u] Harvey v. Desbouverie, For. 135. and see 1 Vern. 89. Hume v. Edwards, 3 Atk. 451. Elliot v. Collyer, ib. 527. Fawkener v. Watts, 1 Atk. 406. Civil v. Rich, 1 Vern. 216. Chace v. Box, Eq. Ca. Abr. 154, 5. where a certificate is given at length of the custom of London, Cleaver v. Spurling, 2 P. Wms. 526.

but principally, because you do not know what to bring into *Hotchpot*[v].

Parol Evidence of a Father's Declaration will not be allowed to debar a Child of its orphanage share; but proofs of declarations by the *Husband*, of a Citizen's daughter in regard to an advancement in Marriage with such daughter, may be read. Proofs also of declarations of the Wife, made during the coverture of her first Husband, may be read against the second[w].

If a Father advances one of his Children in part, and the Child dies leaving Issue, and then the Father dies intestate; the Issue of a dead Child claiming a distributive share, must bring into Hotchpot what their Father had received[x].

But Grand-children, it has been held, are not entitled to a customary share of a Freeman's personal Estate by the Custom of London[y].

Where an *Heir* or *Co-heir* has a *real* Estate settled upon him by the Father, this will not operate as an *advancement*, even though declared by the Will to be so[z]. Any Land provision to the Heir at Law of an Intestate, however given, is privileged by the Statute of Distributions[a].

It is however clear, and has been long settled, that the *eldest Son* is to bring into *Hotchpot* any

[v] Elliot v. Collier, 2 Ves. 16.

[w] Fawkener v. Watts, 1 Atk. 407.

[x] Proud v. Turner, 2 P. Wms. 560.

[y] Fowke v. Hunt, 1 Vern. 397.

[z] Or money to purchase a commission, Hearne v. Barber, 3 Atk. 213.

[a] 2 P. Wms. 440.

advancement to him of *personal Property* [a]. An office, though at will, as a *Gentleman Pensioner's* place [b], or a *commission in the Army* [c], or Money to purchase a Commission, is an advancement, and so is an *Annuity* [d]; and the value of the Annuity is calculated by the value at the date of the grant; or if it has ceased, according to the payments received, at the option of the child [e].

Sums of Money given by a Freeman to a *Daughter*, if not given as a Marriage Portion, or in pursuance of a Marriage Agreement, is not an advancement [f].

If the Father gives Money to put a Son out apprentice [g], or sets him up in a Trade, it is an advancement. So where Money is expressed to be advanced in part of a Fortune, though of small amount, it is an advancement; but if petty sums are given, at different times, by a Father to a Child, and not said to be as a Portion, but by way of present, or otherwise, they are not to be brought into Hotchpot [h].

Presents made by a Freeman to his Child, after frequently living with her for several weeks at a time, have been considered only as a satisfaction

[a] Fitzg. 284. Lord Kircudbright v. Lady Kircudbright, 8 Ves. 55.

[b] Norton v. Norton, 3 Ves. 317. in note.

[c] Hearne v. Barber, 3 Atk. 213.

[d] Lord Kircudbright v. Lady Kircudbright, 8 Ves. 63.

[e] Ib. p. 51.

[f] Hume v. Edwards, 3 Atk. 451. Elliot and Collier, 3 Atk. 528. and see the observations of Mr. Vernon, at the end of his Report of Fowke v. Lewen, 1 Vern. 90.

[g] Sed quæ. see Norton v. Norton, 3 P. Wms. 317. in note O.

[h] Morris v. Burroughs, 1 Atk. 402,3. Norton v. Norton, 3 P. Wms. 317. in note.

for her trouble, and not as a gift to be brought into Hotchpot[i].

A present of a Gold Watch and Wedding Clothes, have been considered as a *personal present*, and not as an advancement[k].

So Aliment[l], maintenance Money, or an allowance made by a Freeman[m] to his son at the University, or in travelling, is not considered as an advance; but *Alimony* paid by a Father to his Child, has been considered as an advancement[n].

Money laid out by the Intestate on the Repairs of Houses, which descended to his eldest Son, as Heir, is not an advancement to be brought into Hotchpot under the Statute. It would be otherwise if the Houses had been given to the Son in the Father's life-time[o].

Questions of advancement can arise only *amongst children*, and not between an only Child and a Widow[p].

A Child advanced, as well as one not advanced, is entitled to a share upon the death of a Brother or Sister[q].

A descent of Lands in *Borough English* to the youngest Son, will not prevent his having a full distributive share of his Father's personal Estate[r].

[i] Hume v. Edwards, 3 Atk. 452. see also Ambl. 189.

[k] Elliot v. Collier, 1 Ves. 16. S. C. 3 Atk. 527.

[l] Edwards v. Freeman, 2 P. Wms. 436. Elliot v. Collier, 1 Ves. 15.

[m] 3 P. Wms. 317. in note.

[n] Elliot v. Collyer, 3 Atk. 528.

[o] Smith v. Smith, 5 Ves. 721.

[p] Garon v. Trippet, Ambl. 190. and see Certificate in Chase and Box, Eq. Cas. Abr. 154.

[q] Hudson v. Hudson, For. 135. Cowper v. Scott, 3 P. Wms. 124.

[r] Lutwyche v. Lutwyche, For. 276.

Questions relative to the administration of Estates according to the custom of *London*, have been much less frequent since the Statute [r], which gives Freemen of the City a power of disposing of their personal Estate, unfettered by the Custom. If the Freeman's personal property is disposed of by Will, it goes according to such disposition; but if he dies intestate wholly, or in part, then the Customary part of the property as to which he dies intestate, is distributable according to the Custom, but the testamentary part is out of the Custom, and is distributable according to the Statute of Distributions [s].

And though a Freeman of London leaves the City, and lives in the Country twenty Years, marries, and makes his Wife a Jointure, and dies, his Estate is distributable according to the custom, and the Wife is entitled to a Share [t].

An *only Child* of a Freeman of *London* advanced in part, is not obliged to bring such part into Hotchpot [u].

If a Man marries an orphan who dies under twenty-one, her orphanage part does not survive to the other children, but goes to the Husband [v].

A daughter of a Freeman, marrying without her Father's consent, loses her orphanage part, unless he is reconciled to her before his death [w].

[r] 11 Geo. 1.

[s] Stapleton v. Sherard, 1 Vern. 432.

[t] Rutter v. Rutter, 1 Vern. 180. Webb v. Webb, 2 Vern. 110.

[u] Fane v. Bench, 2 Vern. 234.

[v] Touke v. Lewen, 1 Vern. 88.

[w] Foden v. Howlett, 1 Vern. 354.

Money to be brought into hotchpot by an Orphan, will be brought into the orphanage part only[x].

By the custom of *York*, a distribution takes place in cases of intestacy, similar in most respects to distributions under the custom of *London*, but is different in some points, as in what regards the Widow and Children of the intestate. The widow is entitled not only to her apparel and the furniture of her chamber, but also to her *paraphernalia*[y]; and with respect to the Children, the orphanage part vests immediately on the death of the Intestate[z].

By the custom of *York*, the Heir who inherits any Land, either in Fee or in Tail[a], or even in reversion only[b], is divested of all claim to a filial portion. If any question arise in the administration of Assets respecting the custom of the City of *York*, an Issue will be directed to be tried at Law[c].

In respect to *Wales*, the doctrine of the *pars rationabilis* extends to Intestate's Effects within that principality[d].

The personal Property of an intestate, wherever situated, must be distributed by the Law of the

[x] Beckford v. Beckford, 1 Vern. 346.

[y] Swinb. p. 6. s. 9. Toller's Law of Executors, 318.

[z] 2 Bl. Com. 519. 4 Burn. Eccl. Law, 398. Toller's Law of Executors, 319.

[a] 4 Burn Eccl. Law 319. Toller Law of Executors 319.

[b] 4 Burn Eccl. Law 319.

[c] Constable v. Constable, 2 Vern. 375.

[d] Toller's Law of Executors 320. 7 and 8 Wil. 3. c. 38.

country where his domicil was[a]; which is *primâ facie* the place of his residence: but that may be rebutted, or supported by circumstances[b].

It has been more than once observed, that the *Statute of Distributions*[c], drawn, it is said, by *Sir Walter Walker*, a famous Civilian[d],) and the Statute of *James the Second*[e], are very incorrectly penned[f]; but the construction of them is settled by decisions.

All questions upon the Statute of Distributions as to computing the degrees of proximity of blood, are decided by the Rules of the *Civil Law*[g].

By the Statute of *James the Second,* if after the death of the Father any of his children die intestate, without Wife or Children, every Brother and Sister and their Representatives are entitled to an equal share with the Mother[h].

By the Common Law, no Person had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased. Then came the 21 *Hen.* 8. which gave the administration to the next of kin; and if there were persons of equal kin, which ever took out administration was entitled to the surplus; but this injustice

[a] Pipon v. Pipon, Ambl. 25. Burn v. Cole, Ambl. 415. Thorne v. Watkins, 2 Ves. 35. Sommerville v. Sommerville, 5 Ves. 750.

[b] Bempde v. Johnstone, 3 Ves. 198.

[c] 22 and 23 Ch. 2. c. 10.

[d] Pett's case, 1 P. Wms. 27.

[e] 1 Jac. 2. c. 17.

[f] Stanley v. Stanley, 1 Atk. 457; and see Edwards and Freeman, 2 P. Wms. 444.

[g] Lloyd v. Tench, 2 Ves. 214; and see Mentney v. Petty, Prec. Ch. 593.

[h] Kelyway v. Kelyway, 2 P. Wms. 344. S. C. Gilbert Rep. 189, 190. 1 Str. 710.

was prevented by the *Statute of Distributions*, which obliges the Administrator to distribute [i].

The Husband is entitled to administer to his Wife [k].

An Executor derives his Power from his Testator; the Administrator from the Ordinary [l].

If administration is granted to two, and one of them dies, the administration *survives* [m].

Though a Person entitled to a distributory share, dies within a year after the intestate, his Interest is considered as vested, and passes to his Executors or Administrators [n]: and this holds equally in lineal and collateral successions [o]; but the share does not in all events vest, for if there be a posthumous child, such child takes a share though not *in esse* at the Intestate's death [p].

Where there is only *one* person entitled to take the personal Estate, as next of kin, the Statute vests the right in that person, making him as a Legatee of the party deceased [q].

[i] Humphrey v. Bullen, 1 Atk. 459. See as to the History of administration what is said in Hudson and Hudson, For. 128, 9.

[k] Ib; and see Edwards and Freeman, 2 P. Wms. 441, etc.

[l] Hudson v. Hudson, 1 Atk. 461.

[m] Hudson v. Hudson, For. 127. Adams v. Buckland, 2 Vern. 514.

[n] 1 Show. 25. 3 Mod. 58. 1 Vern. 403. 2 Vern. 274. Carth. 52. Edwards v. Freeman, 2 P. Wms. 441. and vid. note D. to Davers v. Dewey, 3 P. Wms. 49. See also Hart and King in Exchequer, Trin. 6 Geo. 1. 1720. MS.

[o] Earl of Winchelsea v. Norcliffe, 1 Vern. 403. Wallis v. Hodson, 2 Atk. 116. Palmer v. Alicot, 3 Mod. Gudgeon v. Ramsden, 2 Vern. 274.

[p] 2 P. Wms. 446. Wallis v. Hodgson, 2 Atk. 116.

[q] 3 P. Wms. 49. note D.

The following points have been decided in respect to the Statute of the 22 *and* 23 *Car. II. c.* 10. which as to the Estates of Femes Covert, was explained by the subsequent Statute of 29 *Car. II.* c. 3. s. 25.

If there be Uncle or Aunt's Children, and Brother or Sister's Grand-children, they take equally [r].

If there be a Grand-mother, Uncle or Aunt, the whole goes to the Grand-mother [s].

Two Aunts, a Nephew and a Niece, take equally, *per capita* [t].

If there be an Uncle, and a deceased Uncle's Child, all goes to the Uncle [u].

A Nephew by a Brother, and a Nephew by a half Sister, take equally, *per capita* [v].

A Nephew by a deceased Brother, and Nephews and Nieces by a deceased Sister, take equally, *per capita* [w].

If there be only a Brother and a Grand-father, the Brother takes the whole [x].

If the Intestate dies, leaving a Brother's Grand-

[r] Thomas v. Ketteriche, 1 Ves. 333.

[s] Mentney v. Petit, Prec. Ch. 593. Lloyd v. Tench, 2 Ves. 215.

[t] Durant v. Prestwood, 1 Atk. 455. Lloyd v. Tench, 2 Ves. 213. Page v. Cook, mentioned 2 Ves. 214. contra 1 Domat Civil Law 666.

[u] Bowers v. Littlewood, 1 P. Wms. 593; and see Brecton v. Darkin, 2 Vern. 168. Maw v. Harding, 2 Vern. 233.

[v] Stanley v. Stanley, 1 Atk. 456. Davers v. Dewes, 1 P. Wms. 55. Lloyd v. Tench, 215. Bowers v. Littlewood, 1 P. Wms. 595.

[w] Stanley v. Stanley, 1 Atk. 456. Davers v. Dewes, 1 P. Wms. 50. Lloyd v. Tench, 2 Ves. 215. Bowers v. Littlewood, 1 P. Wms. 595.

[x] Evelyn v. Evelyn, 3 Atk. 762. S. C. Ambl. 191.

son, and a Brother or Sister's Daughter, the Daughter takes the whole [y].

If a Bastard dies intestate, or if any other person having no Wife, Children, or kindred, dies intestate, his effects devolve on the King, who usually makes a grant of them [z].

[y] Pitt's Case, 1 P. Wms. 25.

[z] See 2 Black. Com. 505. Dougl. 542.

END OF THE FIRST VOLUME.

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